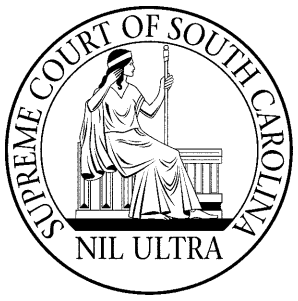

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24

June 10, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

None

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2008-UP-276-Bobby A. Sabb v. State of South Carolina
(Clarendon, Judge Thomas W. Cooper, Jr. and Judge Paula H. Thomas)

2008-UP-277-Renee McDuffie Holland v. Wells McManus Holland
(Aiken, Judge Henry T. Woods)

2008-UP-278-The State v. Christine Grove
(Georgetown, Judge John M. Milling)

2008-UP-279-Kevin Davideit/Keith Davideit (Deceased), Employee v. ScanSource, Employer, and St. Paul Fire & Marine Ins. Co., Carrier
(Greenville, Judge Edward W. Miller)

2008-UP-280-Steve Alvin Sisk v. State of South Carolina
(Fairfield, Judge Kenneth G. Goode and Judge John C. Hayes, III)

PETITIONS FOR REHEARING

4355-Grinnell Corporation v. John Wood	Pending
4369-Mr. T. v. Ms. T.	Pending
4370-Deborah Spence v. Kenneth Wingate	Pending
4372-Sara Robinson v. Est. of Harris (Duggan)	Pending
4373-Amos Partain v. Upstate Automotive	Pending
4374-Thomas Wieters v. Bon-Secours	Pending
4375-RRR, Inc. v. Thomas Toggas	Pending
4376-Wells Fargo v. Turner(R. Freeman)	Pending
4380-Vortex Sports v. Ware (CSMG, Inc.)	Pending
4382-Zurich American v. Tolbert	Pending
4383-Camp v. Camp	Pending
4384-Murrells Inlet Corp. Ward	Pending

4385-Calvin Collins v. Mark Frazier	Pending
4386-State v. R Anderson	Pending
4387-Blanding v. Long Beach	Pending
4388-Horry County v. Parbel	Pending
4389-Ward v. West Oil	Pending
4390-SGM-Moonglo, Inc. v. SCDOR	Pending
4391-State v. Larry Evans	Pending
4392-State v. W. Caldwell	Pending
4394-Platt v. SCDOT (CSX)	Pending
2008-UP-116-Miller v. Ferrellgas	Pending
2008-UP-122-Ex parte: GuideOne	Pending
2008-UP-199-Brayboy v. WorkForce	Pending
2008-UP-204-White's Mill Colony v. Arthur Williams	Pending
2008-UP-205-MBNA America v. Joseph E. Baumie	Pending
2008-UP-214-State v. James Bowers	Pending
2008-UP-218-State v. Larry Gene Martin	Pending
2008-UP-223-State v. Clifton Lyles	Pending
2008-UP-224-Roberson v. White	Pending
2008-UP-226-State v. Gerald Smith	Pending
2008-UP-240-Weston v. Weston	Pending
2008-UP-243-Daryl Carlson v. Poston Packing Co.	Pending
2008-UP-244-Bessie Magaha v. Greenwood Mills	Pending

2008-UP-247-Babb v. Estate of Watson	Pending
2008-UP-248-CCDSS v. Barrs	Pending
2008-UP-251-Pye v. Holmes	Pending
2008-UP-252-Historic Charleston v. City of Charleston	Pending
2008-UP-255-Taylor v. Taylor	Pending
2008-UP-256-State v. Hatcher	Pending
2008-UP-260-Hallmark Marketing v. Zimeri, Inc.	Pending
2008-UP-261-In the matter of McCoy	Pending
2008-UP-271-Hunt v. The State	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4220-Jamison v. Ford Motor	Pending
4233-State v. W. Fairey	Pending
4235-Collins Holding v. DeFibaugh	Pending
4237-State v. Rebecca Lee-Grigg	Pending
4243-Williamson v. Middleton	Pending
4247-State v. Larry Moore	Pending
4251-State v. Braxton Bell	Pending
4256-Shuler v. Tri-County Electric	Pending
4258-Plott v. Justin Ent. et al.	Pending
4259-State v. J. Avery	Pending
4261-State v. J. Edwards	Pending

4262-Town of Iva v. Holley	Pending
4264-Law Firm of Paul L. Erickson v. Boykin	Pending
4267-State v. Terry Davis	Pending
4270-State v. J. Ward	Pending
4271-Mid-South Mngt. v. Sherwood Dev.	Pending
4272-Hilton Head Plantation v. Donald	Pending
4274-Bradley v. Doe	Pending
4275-Neal v. Brown and SCDHEC	Pending
4276-McCrosson v. Tanenbaum	Pending
4277-In the matter of Kenneth J. White	Pending
4279-Linda Mc Co. Inc. v. Shore	Pending
4284-Nash v. Tindall	Pending
4285-State v. Danny Whitten	Pending
4286-R. Brown v. D. Brown	Pending
4289-Floyd v. Morgan	Pending
4291-Robbins v. Walgreens	Pending
4292-SCE&G v. Hartough	Pending
4296-Mikell v. County of Charleston	Pending
4300-State v. Carmen Rice	Pending
4304-State v. Arrowood	Pending
4306-Walton v. Mazda of Rock Hill	Pending
4307-State v. Marshall Miller	Pending

4308-Hutto v. State	Pending
4309-Brazell v. Windsor	Pending
4310-State v. John Boyd Frazier	Pending
4312-State v. Vernon Tumbleston	Pending
4314-McGriff v. Worsley	Pending
4315-Todd v. Joyner	Pending
4316-Lubya Lynch v. Toys “R” Us, Inc	Pending
4319-State v. Anthony Woods (2)	Pending
4325-Dixie Belle v. Redd	Pending
4327-State v. J. Odom	Pending
4328-Jones v. Harold Arnold’s Sentry	Pending
4335-State v. Lawrence Tucker	Pending
4338-Friends of McLeod v. City of Charleston	Pending
4339-Thompson v. Cisson Construction	Pending
4344-Green Tree v. Williams	Pending
4350-Hooper v. Ebenezer Senior Services	Pending
4354-Mellen v. Lane	Pending
2007-UP-125-State v. M. Walker	Pending
2007-UP-151-Lamar Florida v. Li’l Cricket	Pending
2007-UP-172-Austin v. Town of Hilton Head	Pending
2007-UP-187-Salters v. Palmetto Health	Pending
2007-UP-199-CompTrust AGC v. Whitaker’s	Pending

2007-UP-202-L. Young v. E. Lock	Pending
2007-UP-249-J. Tedder v. Dixie Lawn Service	Pending
2007-UP-255-Marvin v. Pritchett	Pending
2007-UP-272-Mortgage Electronic v. Suite	Pending
2007-UP-316-Williams v. Gould	Pending
2007-UP-318-State v. Shawn Wiles	Pending
2007-UP-329-Estate of Watson v. Babb	Pending
2007-UP-341-Auto Owners v. Pittman	Pending
2007-UP-350-Alford v. Tamsberg	Pending
2007-UP-351-Eldridge v. SC Dep't of Transportation	Pending
2007-UP-354-Brunson v. Brunson	Pending
2007-UP-358-Ayers v. Freeman	Pending
2007-UP-364-Alexander Land Co. v. M&M&K	Pending
2007-UP-384-Miller v. Unity Group, Inc.	Pending
2007-UP-460-Dawkins v. Dawkins	Pending
2007-UP-493-Babb v. Noble	Pending
2007-UP-498-Gore v. Beneficial Mortgage	Pending
2007-UP-513-Vaughn v. SCDHEC	Pending
2007-UP-528-McSwain v. Little Pee Dee	Pending
2007-UP-530-Garrett v. Lister	Pending
2007-UP-533-R. Harris v. K. Smith	Pending

2007-UP-546-R. Harris v. Penn Warranty	Pending
2007-UP-554-R. Harris v. Penn Warranty (2)	Pending
2007-UP-556-RV Resort & Yacht v. BillyBob's	Pending
2008-UP-048-State v. Edward Cross (#1)	Pending
2008-UP-070-Burriss Elec. v. Office of Occ. Safety	Pending
2008-UP-082-White Hat v. Town of Hilton Head	Pending
2008-UP-104-State v. Damon Jackson	Pending
2008-UP-126-State v. Werner Enterprises	Pending
2008-UP-132-Campagna v. Flowers	Pending
2008-UP-135-State v. Dominique Donte Moore	Pending
2008-UP-140-Palmetto Bay Club v. Brissie	Pending
2008-UP-141-One Hundred Eighth v. Miller	Pending
2008-UP-144-State v. Ronald Porterfield	Pending
2008-UP-151-Wright v. Hiester Constr.	Pending
2008-UP-273-Bradley v. State	Pending

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carl N. Bryson, as Personal Representative of the Estate of Conrad Ardell Bryson and its heirs, Respondent,

v.

Herman Billy Bryson, Appellant.

Appeal From Pickens County
Charles B. Simmons, Jr., Special Referee

Opinion No. 4400
Submitted May 1, 2008 – Filed June 5, 2008

AFFIRMED

David R. Harrison, of Pickens, for Appellant.

William Douglas Richardson, of Easley, for Respondent.

WILLIAMS, J.: Carl N. Bryson (Carl), as personal representative (PR) of Conrad Ardell Bryson's (Ardell) estate, sued Herman Billy Bryson (Billy) for breach of fiduciary duty. The special referee awarded the estate $306,786.49 in damages and set aside a deed that Ardell transferred to Billy. We affirm.

FACTS

On December 8, 1997, Ardell appointed Billy, his half-brother, as his power of attorney. From 2001 until Ardell's death, Billy spent time with Ardell and took him to the doctor. In 1997, Dr. Thomas E. Parrish (Dr. Parrish) diagnosed Ardell with severe dementia, and later in 1998, Dr. Parrish diagnosed Ardell with Alzheimer's disease. Billy testified he was unaware of the diagnoses. However, several witnesses testified Ardell's symptoms and behavior stemming from Alzheimer's disease were apparent.

At trial, Dr. Parrish opined to a reasonable degree of medical certainty, Ardell was not capable of caring for himself. Furthermore, Dr. Parrish testified Ardell did not have the mental competency to make everyday decisions, transfer personal or real property, or handle his finances. Glenda Bryson Smith (Glenda) and Laura Jane Smith (Laura), Ardell's caretakers, testified Ardell displayed signs of his illness and acted in a childlike manner. Further, Glenda testified Billy hired her to care for Ardell and he knew about Ardell's condition.

After Billy's power of attorney appointment, he and Ardell opened a joint bank account, and several checks were written from that account. One check for $50,000 was written as a loan to an insurance company, which Billy testified was an investment in Hal Blackwell Insurance Company. Billy paid off his son's mortgage with another check from the joint account in the amount of $25,877. Billy also purchased a car, paid for home improvements, took out cash, and made several other purchases for his personal benefit with Ardell's funds while acting as Ardell's power of attorney. Additionally, Ardell deeded property to Billy without consideration on August 8, 2002.

Carl, as PR of Ardell's estate, filed a summons and complaint against Billy in Pickens County on August 18, 2004, alleging Billy breached his fiduciary duty as Ardell's power of attorney and committed fraud and conversion. Billy's answer sought dismissal of the action, but the case proceeded to trial in front of a special referee.[1]

At trial, Billy sought to have Ardell's neighbor, Brian Lloyd Smith (Smith), a witness whom Billy did not name in his answers to the interrogatories and whom Carl was not informed of until the morning of the trial, testify as to his observations of Ardell. The special referee allowed Billy to proffer Smith's testimony but ultimately excluded the evidence. Additionally, at the close of trial, Billy moved for an involuntary nonsuit, claiming Carl was not the real party in interest. The special referee denied this motion.

The special referee found Billy breached his fiduciary duty to Ardell and awarded the estate $306,786.49. Additionally, the special referee ordered the deed of real property, which Ardell transferred to Billy and executed on August 8, 2002, be set aside in its entirety except for the portion of the parcel Ardell transferred to Providence Christian Academy. The special referee ordered the property be included in Ardell's estate. This appeal follows.

STANDARD OF REVIEW

"[A] claim of breach of fiduciary duty is an action at law[,] and the trial [court's] findings will be upheld unless without evidentiary support." Jordan v. Holt, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). Accordingly, our standard of review extends only to the correction of errors of law, and "we will not disturb the referee's factual findings that have some evidentiary support." Jones v. Daley, 363 S.C. 310, 314, 609 S.E.2d 597, 599 (Ct. App. 2005).

[1] Both parties consented to have this matter referred to a special referee.

LAW/ANALYSIS

I. Exclusion of a Witness

Billy contends the special referee erred in excluding Smith's testimony. We disagree.

"The decision of whether or not to allow a witness to testify who was not previously listed on answers to interrogatories rests within the sound discretion of the trial [court]." Jumper v. Hawkins, 348 S.C. 142, 150, 558 S.E.2d 911, 915 (Ct. App. 2001) (citation omitted). "Exclusion of a witness is a sanction which should never be lightly invoked." Id. at 149, 558 S.E.2d at 915 (citation omitted). Before imposing the sanction of excluding a witness, a trial court is required to consider and evaluate several factors:

> (1) the type of witness involved; (2) the content of the evidence emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness' name; (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party.

Id. at 152, 558 S.E.2d at 916.

In Barnette v. Adams Bros. Logging, Inc., the South Carolina Supreme Court found the trial court abused its discretion in excluding an expert witness when there was no disobedience of any court order and no prejudice to the opposing party other than necessity of further discovery. 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003). Additionally, our Supreme Court stated the exclusion rule is designed to promote decisions on the merits after a full and fair hearing, and the trial court's sanction should serve to protect the rights of

discovery provided by the rules of civil procedure. Id. at 592, 586 S.E.2d at 574. In recognizing the potentially harsh sanctions a trial court may invoke in addition to the sanction of exclusion of a witness, our Supreme Court noted, "A sanction of dismissal is too severe if there is no evidence of any intentional misconduct." Id. (internal citations omitted).

Similarly, in Orlando v. Boyd, the South Carolina Supreme Court reversed the trial court's sanction when no evidence of intentional misconduct existed in the record to "warrant the exclusion of a crucial witness." 320 S.C. 509, 512, 466 S.E.2d 353, 355 (1996). Our Supreme Court held, "[When] the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of willful disobedience or gross indifference to the rights of the adverse party." Id. at 511, 466 S.E.2d at 355.

Previously, this Court found it is within the trial court's discretion to allow an appropriate sanction when a party fails to strictly comply with a scheduling order. Arthur v. Sexton Dental Clinic, 368 S.C. 326, 338, 628 S.E.2d 894, 900 (Ct. App. 2006). Therefore, when noncompliance is undisputed, the question becomes whether the trial court abused its discretion in imposing exclusion of a witness as a sanction. Id. Though the trial court did not specifically enunciate the Jumper factors, this Court found the trial court "considered the requisite factors and made the appropriate inquiry before ultimately excluding the challenged witnesses." Id. at 339, 628 S.E.2d at 901.

In the present case, Billy attempted to call Smith as a witness, and Carl objected because Smith's name was not provided in the answers to interrogatories. Additionally, Carl was not informed Billy was calling Smith as a witness until the morning of the trial. The special referee allowed Billy to proffer Smith's testimony, and based on the content of Smith's proffer, the special referee excluded Smith as a witness. By virtue of the proffer, we find the special referee properly considered the Jumper factors. Cf. Jumper, 348 S.C. at 150-51, 558 S.E.2d at 916 ("[T]he court never made an inquiry into the content of the evidence [the expert witness] would offer. By not getting any information about the proposed witness' testimony, the court did not

meet its duty of discovering and evaluating the content of the potential evidence.") (emphasis in original).

Billy wished to call Smith as a fact witness,[2] and through his proffer, Smith explained he had known Ardell his whole life and was his neighbor for several years. Smith also stated Ardell's will named the chairman of the board of deacons of their church as administrator of his estate. Further, Smith stated Ardell appeared lucid, competent, and able to understand conversations. Therefore, the special referee properly considered the type of witness Smith would be and the content of his proposed testimony as required by the first and second factors of Jumper.

Additionally, the special referee satisfied the third Jumper factor by considering the nature of Billy's failure to furnish Smith's name as a witness, stating, "It is clear from his testimony he is here as a result of a conversation with your client prior to ever receiving a letter from [Carl's attorney]. And the motivating factor was a personal contact with your client as opposed to notification that there was a trial."

As to the fourth and fifth Jumper factors, this late notification inevitably created significant surprise and prejudice to Ardell's estate and its representatives. The failure to inform the estate until the morning of the trial that Smith would be a witness left the estate with an insufficient amount of time to adequately prepare for an examination of Smith and eliminated the estate's opportunity to depose Smith. See Arthur, 368 S.C. at 341, 628 S.E.2d at 902 (finding the respondent was significantly surprised and

[2] We note Barnette and Orlando involved the exclusion of expert witnesses rather than the exclusion of a lay witness as in the present case. After excluding the expert witnesses, the trial courts dismissed the cases. Barnette, 355 S.C. at 591, 586 S.E.2d at 574; Orlando, 320 S.C. at 511, 466 S.E.2d at 355. The exclusion of Smith's testimony, however, did not lead to such a dramatic result. Further, Smith's testimony, while favorable to Billy, was not as crucial to the case as were the witnesses' testimonies in Barnette and Orlando. These distinctions support the conclusion the special referee's exclusion was not an abuse of discretion.

prejudiced when the appellant failed to give notice of two witnesses until the Friday before trial because the respondent was not able to depose the witnesses before trial).

Based on the foregoing, we find the special referee properly considered all factors set forth in Jumper when deciding to exclude Smith as a witness, and therefore, the exclusion was not an abuse of discretion.

II. Involuntary Nonsuit

Billy also contends the special referee erred in failing to grant his motion for an involuntary nonsuit. Specifically, Billy argues Carl, as PR of Ardell's estate, is not the real party in interest. We disagree.

Rule 17(a), SCRCP, provides in part:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State.

Unless a party promptly challenges the opposing party's status as a real party in interest, such a challenge is waived. Bardoon Props., NV v. Eidolon Corp., 326 S.C. 166, 169, 485 S.E.2d 371, 373 (1997) ("A challenge to a party's status as real party in interest must be made promptly or the court may conclude the point has been waived.").

We find Billy waived his right to challenge Carl's status as the real party in interest. Billy first raised this argument at the close of trial.[3] Although Billy asserts he raised such a motion at the beginning of trial as well, the record is devoid of such evidence. As the appellant, Billy bears the burden of presenting a sufficient record for review. See Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339-40, 611 S.E.2d 485, 487-88 (2005) (stating the appellant has the burden of providing a sufficient record on appeal).

Because Billy has failed to provide a sufficient record for our review in this matter, we affirm the special referee's denial of Billy's motion for an involuntary nonsuit. See Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 447, 494 S.E.2d 827, 834 (Ct. App. 1997) (holding the appellate court must affirm the trial court on an issue when the appellant fails to provide adequate materials for this Court to consider the argument).

III. Repayment from Property Sale

Finally, Billy argues the special referee erred in ordering him to repay monies from a sale of property when the special referee did not set aside the sale of property. We find this issue abandoned on appeal.

An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. Historic Charleston Holdings, L.L.C. v. Mallon, 365 S.C. 524, 533 n.7, 617 S.E.2d 388, 393 n.7 (Ct. App. 2005). Billy failed to cite any authority in support of his assertion the special referee erred in ordering him to repay proceeds from the sale of property. Therefore, Billy abandoned this issue on appeal, and we decline to consider the argument.

[3] Billy argues Ardell appointed members of the Six Mile Baptist Church as executors of his estate through his will and made no provisions for a PR.

CONCLUSION

Accordingly, the special referee's decision is

AFFIRMED.[4]

THOMAS and PIEPER, JJ., concur.

[4] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Doe, Appellant,

v.

Jane Roe, Respondent.

Appeal From Richland County
Anne Gué Jones, Family Court Judge

Opinion No. 4401
Heard May 7, 2008 – Filed June 5, 2008

REVERSED AND REMANDED

Holly Huggins Wall, of Johnsonville, for Appellant.

Emma I. Bryson, of Columbia, for Respondent.

PIEPER, J.: John Doe (Father) appeals the family court's order terminating his parental rights to his biological child (Child) and ordering payment of his attorney's fees and $1,635.50 in guardian ad litem fees. We reverse and remand.

FACTS

In July 2004, Jane Roe (Mother) learned she was pregnant and informed two men that one of them is Child's father. Eight months later, on March 6, 2005, Child was born. Both potential fathers were at the hospital for Child's birth. The man excluded from being Child's biological father assisted Mother in the delivery room and served as Mother's birth coach.[1] Father was not permitted in the delivery room during Child's birth. While at the hospital the day after Child's birth, Mother indicated she was uncomfortable and wanted Father to leave. As a result, she requested that her father (Grandfather) ask Father to leave.

Less than a week after Child's birth and prior to any determination as to paternity, Grandfather called Father to meet with him to discuss the rights and responsibilities of parenthood should the paternity test reveal Father to be Child's biological father. During this conversation, Grandfather indicated that child support and visitation are inextricably linked. Grandfather further suggested the possibility of termination of parental rights should Father decide he did not want to assume parental responsibilities.[2] Additionally, Grandfather directed Father to the DSS website and indicated that the site includes a child support calculator.

On March 15, 2005, nine days after Child's birth, Grandfather informed Father a paternity test had excluded the other man as Child's father. The same day, Mother e-mailed photos of Child to Father. The next day, Father told his mother about the paternity test results, and the following day she visited Child with a gift.

---

[1] The man excluded from being Child's biological father is now Mother's fiancé. Mother testified they began an exclusive relationship in December 2004 and became engaged in May 2005.

[2] This conversation took place before the paternity test revealed Child's biological father.

On December 15, 2005, Father filed a complaint asking the court to establish his paternity and to award attorney's fees and costs. Father additionally sought an award of custody or liberal visitation and to issue a restraining order against Mother should his paternity be established. In Mother's answer, she agreed to Father's request for a paternity determination; she also counterclaimed, asking the court to terminate Father's parental rights (TPR) and to award attorney's fees and costs. Mother further requested: (1) that the court hold in abeyance the issues of child support and visitation, pending the court's TPR decision; (2) that the court issue a restraining order against Father; and (3) that the court award attorney's fees and costs. In a temporary order, the court ordered paternity testing and appointed Patricia Forbis as Child's guardian ad litem (GAL). On June 8, 2006, Mother and Father agreed to bifurcate the issues in order to expedite a decision regarding TPR. Additionally, they agreed the court would thereafter determine GAL and attorney's fees only if Father's parental rights were terminated.

The hearing on the TPR issue was held on October 9 and 10, 2006. Child was then nineteen months old. At the call of the hearing, the court was advised a paternity test had determined Father was Child's father; neither party contested this finding.[3] In its written order of December 19, 2006, the court terminated Father's parental rights based upon its finding that clear and convincing evidence supported TPR on the statutory grounds of failure to visit and failure to support Child for six months and finding TPR was in Child's best interest. The court further ordered Mother and Father to pay their own attorney's fees, ordered Mother to pay GAL fees of $845.50, and ordered Father to pay GAL fees of $1,635.50. Father's petition for supersedeas was denied on June 6, 2007. This appeal followed.

STANDARD OF REVIEW

In TPR proceedings, the best interest of the child is the paramount consideration. Doe v. Baby Boy Roe, 353 S.C. 576, 579, 578 S.E.2d 733,

[3] A paternity test conducted in March 2006 confirmed Father was Child's biological father; however, the family court was not notified of this prior to the October 2006 TPR hearing.

735 (Ct. App. 2003). Before parental rights can be permanently terminated, the alleged grounds for termination must be proven by clear and convincing evidence. Richberg v. Dawson, 278 S.C. 356, 357, 296 S.E.2d 338, 339 (1982). On appeal, this court may review the record and make its own determination whether grounds for termination are supported by clear and convincing evidence. S.C. Dep't of Soc. Servs. v. Headden, 354 S.C. 602, 609, 582 S.E.2d 419, 423 (2003). Despite this broad scope of review, however, we are not required to disregard the findings of the family court, who saw and heard the witnesses, and was in a better position to assign comparative weight to their testimony. Id. In reviewing TPR cases, we note "[t]he termination of the legal relationship between natural parents and a child presents one [of] the most difficult issues this [c]ourt is called upon to decide." Charleston County Dep't. of Soc. Serv. v. King, 369 S.C. 96, 105, 631 S.E.2d 239, 244 (2006) (alteration in original) (citations omitted). As a result, "[w]e exercise great caution in reviewing termination proceedings and will conclude termination is proper only when the evidence clearly and convincingly mandates such a result." Id.

LAW/ANALYSIS

In South Carolina, procedures for TPR are governed by statute. See S.C. Code Ann. §§ 20-7-1560 to 1582 (Supp. 2007). The purpose of the TPR statute is:

> to establish procedures for the reasonable and compassionate termination of parental rights where children are abused, neglected, or abandoned in order to protect the health and welfare of these children and make them eligible for adoption by persons who will provide a suitable home environment and the love and care necessary for a happy, healthful, and productive life.

S.C. Code Ann. § 20-7-1560 (Supp. 2007).

The family court may order TPR upon a finding of one or more of the eleven statutory grounds and a finding that TPR is in the best interest of the

child. See S.C. Code Ann. § 20-7-1572 (Supp. 2007). The TPR statute "must be liberally construed in order to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent-child relationship. The interests of the child shall prevail if the child's interest and the parental rights conflict." S.C. Code Ann. § 20-7-1578 (Supp. 2007).

Father first alleges it was improper for the family court to determine his paternity and terminate his parental rights in the same order. This issue is not preserved for our review.

This argument was not raised to the family court and is, therefore, not preserved for our review. "It is an axiomatic rule of law that issues may not be raised for the first time on appeal." Talley v. S.C. Higher Educ. Tuition Grants Comm., 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986). Additionally, we note Father and Mother signed an order bifurcating the issues to expedite the TPR determination. See Harrison v. Bevilacqua, 354 S.C. 129, 139-40, 580 S.E.2d 109, 114-15 (2003) (stating "petitioner cannot now complain the trial court erred when it took [his] own suggestion").

Next, Father asserts the family court erred in finding clear and convincing evidence exists to establish the statutory grounds of willful failure to visit and willful failure to support. Although we disagree that the family court erred with regard to these statutory grounds, we need not address this argument in light of our ruling on whether termination is in the best interest of the child.

Father argues the family court erred in determining TPR was in Child's best interest. We agree. "If the family court finds that a statutory ground for [TPR] has been proven, it must then find that the best interests of the child would be served by [TPR]." Doe v. Baby Boy Roe, 353 S.C. 576, 580, 578 S.E.2d 733, 735 (Ct. App. 2003). In a TPR case, the best interest of the child is the paramount consideration. Id. at 579, 578 S.E.2d at 735. "The interests of the child shall prevail if the child's interest and the parental rights conflict." S.C. Code Ann. § 20-7-1578 (Supp. 2007). However, "[t]he public policy of this state in child custody matters is to reunite parents and

children." Hooper v. Rockwell, 334 S.C. 281, 296, 513 S.E.2d 358, 366 (1999); S.C. Code Ann. § 20-7-20. The supreme court has recognized a child's shared interest in preventing an erroneous termination of the familial bond with a child's natural parent. Greenville County Dep't Soc. Servs. v. Bowes, 313 S.C. 188, 196, 437 S.E.2d 107, 111 (1993). Furthermore, there is a presumption that it is in the best interest of a child to be in the custody of its biological parent. Shake v. Darlington County Dep't of Soc. Servs., 306 S.C. 216, 222, 410 S.E.2d 923, 926 (Ct. App. 1991) (citing Moore v. Moore, 300 S.C. 75, 79, 386 S.E.2d 456, 458 (1989)).

Terminating parental rights can forever sever the relationship between parent and child. As a result of the gravity of the effect of termination on a parent-child relationship, our courts have routinely held that a decision to terminate parental rights should be reached only when the evidence supports a finding that termination is in the best interest of the child. In an effort to protect an individual's parental rights to children born out of wedlock, this court, in Charleston County Soc. Servs. v. Jackson, reversed the family court's order terminating father's parental rights where father was incarcerated and unable to connect with child. 368 S.C. 87, 103, 627 S.E.2d 765, 774 (Ct. App. 2006). In reasoning that TPR was not in child's best interest, the court stated:

> terminating Father's parental rights will not ensure future stability for Child. Moreover, keeping Father's parental rights intact will not disrupt Child's current living situation. Father does not gain custody of Child simply because the Department failed to terminate his parental rights at this time. Rather, by not terminating Father's parental rights, Father merely maintains his right to connect with Child as well as his obligation to support Child, emotionally, financially, or otherwise. The Department should, in the best interest of Child, facilitate this connection and accompanying obligation.

Id. (emphasis added). The Jackson court ruled in favor of father despite the inevitable lack of conventional support the incarcerated father could provide

child while in prison. Id. In finding that termination was not in child's best interest, the court noted that the child resided in a therapeutic foster home and child's foster parents had not expressed an interest in adopting him. Id. Because there was no evidence that the foster parents had plans to adopt child, the court found terminating father's parental rights would not ensure future stability for child and keeping father's rights intact would not disrupt child's current living situation. Id.

Here, as in Jackson, there is no indication that terminating Father's rights will ensure future stability for Child or that keeping Father's parental rights intact will disrupt Child's current living situation. Instead, keeping Father's parental rights intact simply allows Father to establish a relationship with Child and to provide emotional and financial support for Child. While we acknowledge that there is some evidence to suggest that Mother had plans to marry and that fiancé may adopt Child, these plans have not been finalized. Further, at oral argument, nearly three years after Mother's engagement, counsel was unable to confirm such plans.[4] Thus, while we recognize that a stable family relationship may be in a child's best interest, we find the request herein to be premature based on the record presented. If anything, given Mother's situation and Father's demonstrated desire to establish a relationship with Child, we find that keeping Father's rights intact under these circumstances will only serve to benefit Child by allowing the familial bond between Father and Child to be furthered.

Moreover, Father is both capable and willing to provide the necessary emotional, financial, and other obligations embodied in a parent's right to

[4] Additionally, we note that one of the primary purposes of TPR is to immediately free the child for adoption. S.C. Code Ann. § 20-7-1560 (Supp. 2007). This is especially true in cases where a child is faced with abuse and neglect. Following their engagement in May 2005, Mother and fiancé planned to be married in October of 2006. This date was cancelled. At oral argument, there was no evidence of record that the couple had subsequently married or set a new date. Again, we consider this only for purposes of whether there exists some beneficial interest to Child to be part of some other stable family relationship.

care for a biological child. Since Father demonstrates his desire to establish a relationship with Child and because keeping Father's rights intact need not disrupt the quality of Child's life, the record fails to demonstrate that it would be in Child's best interest to terminate Father's parental rights at this time. Instead, based on the record, we find Father should have the opportunity to connect with Child in such manner deemed appropriate under the reasoned view of the family court.

Next, Father contends the family court's decision to terminate his parental rights violates his constitutional right to have a relationship with his biological child. Because this issue was not raised to the family court, it is not preserved for our review. Further, due to our disposition herein, we need not address this issue. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (finding the court need not address remaining issue when resolution of prior issue is dispositive).

Father also argues the family court erred by ordering him to pay GAL fees of $1,635.50 and his own attorney's fees. We disagree.

Father fails to support his argument with authority; therefore, the argument is conclusory and is abandoned on appeal. See Rule 208(b)(1)(D), SCACR. Notwithstanding, we find the family court did not abuse its discretion and affirm the family court's order regarding GAL and attorney's fees.

CONCLUSION

We find that termination of Father's parental rights is premature at this juncture and is, therefore, not in Child's best interest. Accordingly, we remand this case to the family court to issue an order of visitation and to establish Father's duty of support. Additionally, we find the family court did not abuse its discretion in ordering Father to pay his own attorney's and GAL fees. For the foregoing reasons, the order of the family court is

REVERSED AND REMANDED.

HEARN, C.J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Terry T. Tindall, Appellant.

Appeal From Oconee County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 4402
Heard March 4, 2008 – Filed June 5, 2008

AFFIRMED

John S. Nichols, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Christina T. Adams, of Anderson, for Respondent.

SHORT, J.: In this criminal action, Terry T. Tindall appeals the trial court's ruling that a search and seizure did not violate the Fourth Amendment. Tindall also appeals the trial court's failure to charge the jury on the issue of third-party guilt. We affirm.

FACTS

On the morning of April 15, 2004, Oconee County Sheriff's Deputy Sergeant Dale Colegrove was patrolling part of Interstate 85 in Oconee County. Colegrove stopped Tindall about 7 a.m. for speeding and following another vehicle too closely. Colegrove wrote Tindall a warning ticket but continued to talk to him. Approximately fifteen to twenty minutes into the stop, Tindall allegedly consented to a search of the vehicle. Sergeant Colegrove and other officers discovered three packages of cocaine under the rear bumper of the vehicle, weighing a total of 2,380 grams.

A grand jury indicted Tindall for trafficking in cocaine in excess of four hundred grams. At trial, Tindall moved to suppress the evidence discovered during the search. Colegrove and Tindall testified in camera during the suppression hearing.

Tindall testified that the morning of his arrest, he was traveling from his home in Hampton, Georgia to visit his brother in Durham, North Carolina. He testified he and his brother were going to Wilmington, North Carolina "to take care of some business" for their mother. The vehicle Tindall was driving at the time of his stop was rented to Lee Braggs. Tindall was named an authorized driver, as was another individual, Lewis Wilkerson. Tindall testified his car was not reliable enough to make the trip and because he did not have a credit card, Braggs had rented the vehicle for him.

After Colegrove pulled Tindall over, he informed Tindall he had been speeding, swerving, and following too closely. Tindall denied speeding or following too closely. Colegrove requested Tindall exit the vehicle and sit in the front seat of his patrol car. As Colegrove questioned Tindall, two other police cars arrived.

Colegrove asked Tindall how long he would be in North Carolina, and he replied he would only be there for the day.[1] Tindall testified he informed Colegrove he intended to leave the rental car in Durham and his brother was going to drive him back to Hampton. Tindall explained that once the car was in Durham, Braggs, a restaurateur, needed the car to pick up seafood in North Carolina or Florida. Tindall testified Braggs knew Tindall did not have the means to get to Durham, so Braggs rented the car and let Tindall drive it to Durham. Tindall also said Braggs "needed to get to Durham quicker than driving there. He needed to get to Durham to take care of some business, and he needed the car once he got to Durham."

Colegrove returned Tindall's license and other documents, along with a warning ticket. Tindall testified he did not feel as though he could leave because Colegrove was still talking to him and the other officers were standing beside the door of the police car. He further testified Colegrove never informed him he could leave. Colegrove then asked Tindall if he could search the car and Tindall replied: "I don't care or . . . I don't mind." Tindall testified he believed the stop lasted twenty minutes but was not surprised to learn the videotape from Colegrove's car revealed it was only twelve minutes.

Colegrove testified he observed Tindall traveling seventy-three miles per hour in a sixty-five-mile-per-hour zone. He also observed him following another car too closely and crossing the white line. Colegrove decided to stop Tindall and started the videotape equipment in his vehicle. Colegrove testified when Tindall exited the vehicle he did a "felony stretch," raising his hands as "kind of a stress relief action," which police officers are taught to look for in criminal patrol classes. He further testified Tindall continued to act very nervous even after learning he would only receive a warning ticket. He also testified normally once people learn they will not receive a ticket their nervousness subsides, but Tindall continued to have a rapid heartbeat. On cross-examination, Colegrove admitted he did not document Tindall's physical manifestations of nervousness in his report.

---

[1] Tindall testified it took seven hours to get from Hampton to Durham and then over two hours to get from Durham to Wilmington.

Additionally, Colegrove testified he found the circumstances of Tindall's trip suspicious because the car had to be returned to Atlanta that same day and Tindall was not the renter of record. Also, Colegrove testified the cities traveled to and from were considered "drug hubs." Based on his observations, Colegrove concluded Tindall was concealing something illegal inside the car.

Following the suppression hearing, the trial court denied Tindall's motion to suppress finding Colegrove had a reasonable suspicion that something illegal was occurring. Tindall also moved to suppress a statement he gave to officers at the scene of the arrest. The trial court denied the motion to suppress the statement.

The jury convicted Tindall of trafficking in cocaine. The trial court sentenced Tindall to twenty-five years imprisonment and assessed a $250,000 fine. This appeal followed.

STANDARD OF REVIEW

The South Carolina Supreme Court has articulated the standard of review to apply to Fourth Amendment search and seizure cases. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000). A trial court's factual rulings are reviewed under the "clear error" standard, like any other factual finding. Id. at 66, 528 S.E.2d at 666. The appellate court will affirm if any evidence supports the ruling and reverse only if there is clear error. Id. Under the "clear error" standard, an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently. State v. Pichardo, 367 S.C. 84, 95-96, 623 S.E.2d 840, 846 (Ct. App. 2005).

LAW/ANALYSIS

I. Fourth Amendment Violation

Tindall contends the trial court erred in denying his motion to suppress the cocaine because the traffic stop and subsequent encounter violated his Fourth Amendment rights. We disagree.

The Fourth Amendment guarantees a person the right to be secure from unreasonable searches and seizures. U.S. Const. amend. IV; State v. Butler, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000). "[T]he Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention." State v. Pichardo 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005). A temporary detention during an automobile stop, even if only for a brief period and for a limited purpose, constitutes a seizure within the meaning of the Fourth Amendment. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). Thus, an automobile stop is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." Whren v. United States, 517 U.S. 806, 810 (1996). When probable cause exists to believe a traffic violation has occurred, the decision to stop the automobile is reasonable per se. State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002).

When police lawfully detain a motor vehicle for a traffic violation, they may order the driver to exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures. Id. In carrying out the stop, the police "may request a driver's license and vehicle registration, run a computer check, and issue a citation." United States v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998) (quoting Florida v. Royer, 460 U.S. 491 (1983)). Once the underlying basis for the initial traffic stop has concluded, any further detention for questioning is not automatically unconstitutional. Pichardo, 367 S.C. at 98-99, 623 S.E.2d at 847-48. An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop and the scope of the detention must be carefully tailored to its underlying justification. Florida v. Royer, 460 U.S. 491, 500

(1983). Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention. Williams, 351 at 598-99, 571 S.E.2d at 707-08.

Lengthening a detention once an initial stop is completed is permissible in two situations: (1) the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring; or (2) the initial detention has become a consensual encounter. Pichardo, 367 S.C. at 99, 623 S.E.2d at 847-48 (quoting United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998)). Thus, an "officer's continued questioning of a vehicle's driver and passenger outside the scope of a valid traffic stop passes muster under the Fourth Amendment either when the officer has a reasonable articulable suspicion of other illegal activity or when the valid traffic stop has become a consensual encounter." Id.

The term "reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity. State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001). In determining whether reasonable suspicion exists, the whole picture must be considered. United States v. Sokolow, 490 U.S. 1, 8 (1989). The burden is on the State to articulate facts sufficient to support reasonable suspicion. State v. Butler, 343 S.C. at 202, 539 S.E.2d at 416.

We find the traffic stop ended when Colegrove issued the warning and returned Tindall's license. Therefore, Tindall was detained after the conclusion of the traffic stop. The State argues the detention was consensual. We need not determine if the detention was consensual because we find Colegrove had an objectively reasonable articulable suspicion illegal activity had occurred or was occurring.

Colegrove testified he further detained Tindall because he believed something illegal was occurring based on Tindall's actions after the stop. Colegrove observed numerous things after the stop including: 1) Tindall was nervous even after receiving the warning; 2) Tindall was driving a rental car that he had not rented; 3) Tindall was driving only one way and then dropping the car off; 4) Tindall planned on driving approximately eighteen

hours in one day; and, 5) the cities involved were both "drug hubs." We find evidence in the record to support a determination that Colegrove had a reasonable suspicion something illegal was occurring. Therefore, the search and seizure did not violate Tindall's Fourth Amendment rights and the trial court did not err in admitting the cocaine.

II. Suppression of Statement

Tindall argues the trial court erred in admitting his statement because it was obtained as a result of the alleged violation of the Fourth Amendment. We disagree. Although Tindall's Brief references Miranda v. Arizona, 384 U.S. 436 (1966), the argument solely concerns the legality of the search. Because we find the search legal, as previously discussed, the trial court did not err in admitting the statement.

III. Third-Party Guilt

Tindall maintains the trial court erred in failing to instruct the jury on the issue of third-party guilt. We disagree.

The trial court is required to charge the law as determined from the evidence presented at trial. State v. Gates, 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977). If any evidence supports a charge, it should be given. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). A trial court's refusal to give a requested charge must be both erroneous and prejudicial to warrant reversal. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." Id. at 263, 565 S.E.2d at 304.

In the recent decisions of State v. Rice[2] and State v. Swafford[3], this Court reiterated that the rule for admitting third-party guilt in South Carolina

[2] 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007).

[3] 375 S.C. 637, 654 S.E.2d 297 (Ct. App. 2007).

is found in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). The rule states:

> [E]vidence offered by [an] accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible . . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

Gregory, 198 S.C. at 104-05, 16 S.E.2d at 534-35 (internal citations omitted). The Gregory rule "and its analogues in other jurisdictions" require the trial court to "focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." Rice, 375 S.C. at 320, 652 S.E.2d at 418. "[T]he Gregory rule [also] requires the trial judge to consider the probative value or the potential adverse effects of admitting proffered third-party guilt evidence." Swafford, 375 S.C. at 641, 654 S.E.2d at 299.

While these third-party guilt cases revolve around the admission of evidence of third-party guilt, Tindall appeals the trial court's failure to charge the jury on third-party guilt. The evidence at trial indirectly implicating a third party included Tindall's testimony that he took possession of the rental vehicle when "[i]t was left in the driveway of [his] home" the day before his trip and the fact that he did not rent the vehicle. The trial court found it had not "heard any testimony in particular blaming a third party." The evidence that someone other than Tindall placed the drugs in the car raised merely a conjectural inference at best and we find no error by trial court based on State v. Gregory.

Furthermore, the trial court charged the jury on mere presence, stating:

> Now, to prove possession in this case, the State must prove beyond a reasonable doubt that the defendant had both the power and the intent to control the disposition or use of the cocaine. Possession may be either actual or constructive. Actual possession means that the cocaine was in the actual physical custody of the defendant. Constructive possession means that the defendant had dominion and control or the right to exercise dominion or control over any of the cocaine itself or the property in which the cocaine was found.
>
> Mere presence at the scene where the drugs were found is not enough to prove possession. Actual knowledge of the presence of the cocaine is strong evidence of the defendant's intent to control its disposition or use. The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control. However, the inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in the case and to be given the weight you decide it should have.

We find this charge adequately charged the law as determined from the evidence presented at trial. See Gates, 269 S.C. at 561, 238 S.E.2d at 681 (finding trial court required to charge the law as determined from the evidence presented at trial). Accordingly, because the charge given provided the proper law for the jury to consider given the evidence presented, the trial court did not err in failing to give the requested charge.

CONCLUSION

For the foregoing reasons, the trial court's order is

AFFIRMED.

ANDERSON and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dean Edgar Wiesart, Appellant,

v.

Robert M. Stewart, Respondent.

Appeal From Horry County
John M. Milling, Circuit Court Judge

Opinion No. 4403
Heard May 8, 2008 – Filed June 5, 2008

REVERSED

Timothy Kirk Truslow, of North Myrtle Beach, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General David E. Spencer, all of Columbia, for Respondent.

GOOLSBY, A.J.: Wiesart appeals the trial court's ruling that S.C. Code Ann. §23-3-430(14) (Supp. 2007) is not retroactive. We reverse.

FACTS

In 1979, a Maryland court convicted Wiesart of indecent exposure after he was caught skinny-dipping with his girlfriend in a hotel pool. Fifteen years later, Wiesart pled guilty in Horry County to a controlled substance offense. He received probation. Wiesart's probation agent informed him that he was required to register under the sex offender registry pursuant to S.C. Code Ann. § 23-3-430 (Supp. 1995) because of the prior indecent exposure conviction.

Prior to 1996, S.C. Code §§ 23-3-430 and 23-3-460 required any person convicted of indecent exposure to register annually[1] as a sex offender. In 1996, the statute was amended to include a person convicted of indecent exposure only "if the court makes a specific finding on the record based on the circumstances of the case the convicted person should register as a sex offender."[2]

On January 9, 2006, upon learning of the amendment, Wiesart brought a declaratory judgment action in the trial court. He argued he was entitled to a hearing on the issue of whether he was required to register as a sex offender pursuant to § 23-3-430, as amended. The trial court ruled against Wiesart, finding the statute was not retroactive. Wiesart appeals.

---

[1] In 2006, S.C. Code §23-3-460 (Supp. 2006) was amended to require bi-annual registration.

[2] S.C. Code Ann. § 23-3-430(14) (Supp. 2006).

LAW / ANALYSIS

Wiesart argues the amendment to § 23-3-430 is retroactive because it is procedural or remedial in nature. We agree.[3]

Generally, "statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary."[4] Statutes that are remedial or procedural in nature, however, operate retroactively.[5] A statute is remedial and applies retroactively when it creates new remedies for existing rights or enlarges rights of persons under disability.[6]

Here, the 1996 amendment to § 23-3-430 is procedural in nature. As set forth above, the amendment creates a requirement that the trial court make a specific finding on the record regarding whether a person convicted of indecent exposure should register as a sex offender. The amendment does not create a new right. Instead, it sets forth a procedure for determining whether a person convicted of indecent exposure is required to register on the sex offender registry.[7]

---

[3] We are aware of Hazel v. State, Op. No. 26448 (S.C. Sup. Ct. filed March 10, 2008) (Shearouse Adv. Sh. No. 9 at 52). Hazel, however, does not apply to this case because retrospective application of the registration statute was not an issue in Hazel.

[4] South Carolina Dept. of Revenue v. Rosemary Coin Machines, Inc., 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000).

[5] Id.

[6] 4 S.C. Jurisprudence Action § 15 (2007); see Hercules, Inc. v. South Carolina Tax Comm'n, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) (statutes affecting the remedy, not the right, are generally retrospective).

[7] This court does not pass judgment on the issue of whether the circumstances of this case warrant Wiesart's registration as a sex offender.

Moreover, the registration requirement renews itself on a recurring basis. We take note of the fact that the Legislature was aware of this recurring obligation when it passed the amendment to the statute regarding the necessary findings for registration.

REVERSED.

HEARN, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patsy Gail Nicholson and Kyle Allen Nicholson, Respondents,

v.

F. Allan Nicholson, Appellant.

Appeal From Pickens County
Rochelle Y. Williamson, Family Court Judge

Opinion No. 4404
Submitted June 1, 2008 – Filed June 6, 2008

AFFIRMED

Margaret A. Chamberlain, of Greenville, for Appellant.

Brian K. James, of Easley, for the Respondents.

ANDERSON, J.: Patsy Gail Nicholson (Mother) and her adult son Kyle Allan Nicholson (Kyle) initiated this action against F. Allan Nicholson (Father) seeking Father's payment of Kyle's college expenses pursuant to a

separation agreement. Father appeals the family court's order in favor of Mother and Kyle. We affirm.[1]

FACTUAL / PROCEDURAL BACKGROUND

Mother and Father married in March 1978, separated in October 1992, and later divorced. They had two children, Kyle being the youngest. A separation agreement entitled "Complete Property, Support, Custody, and Separation Agreement" (the Agreement) was approved by the family court and made part of the Order Approving Separation. The Agreement provided:

> 3-OTHER BENEFITS FOR CHILDREN
>
> The Husband presently owns ____ shares of stock in Duke Power Company, as a result of his employment. The Husband agrees to use the proceeds from the sale of the stocks for the minor children's educational needs, first and foremost, or to other necessities for the children as a need may arise. Notwithstanding his continued employment at Duke Power Company or his termination from employment, the Husband agrees to provide for the minor children in an amount equivalent to the value of 1,200 shares of the Duke Power Stock at its present value of 36,000.

Kyle graduated from high school in May 2006 with a grade point average of 3.4 and ranked thirty-eighth in a class of one hundred fifteen. He received awards in art during his junior and senior years. His career ambitions focused on the design field with special interests in automotive design or architecture. In September 2006, he enrolled at Tri-County Technical College majoring in University Transfer hoping to later attend Clemson University or another school offering design programs.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

While still in high school, Kyle was diagnosed with depression and placed on medication. During his first semester at the technical college, he explained to the court his depression was worsened by the stress of not knowing where he would live or if he would have the money to continue his education. His anxiety grew to the point where "everyday was kind of a struggle" and, following a suicide attempt and hospitalization, he withdrew from school. Kyle did not take his prescribed medication properly, used marijuana prior to his hospitalization, and tried cocaine one time. At the time of the hearing, Kyle remained in counseling and found it beneficial. He no longer uses illegal drugs and his prescribed medicine has been adjusted with positive results. Kyle returned to Tri-County Technical College the spring semester following his withdrawal.

In his financial declaration, Kyle indicated he intended to participate in a work-study program expecting to earn $309 per month. His tuition was covered by financial aid, federal Pell grants, and a Life Scholarship requiring he maintain a 3.0 grade point average and complete a certain number of credits.

Kyle used a car, but it was not in his name. Because Mother had totaled her vehicle and was moving from the area, she would take the car Kyle had been driving. Among the expenses Kyle submitted were auto related costs of $250 per month and automobile payments of $300 per month. On a monthly basis, Kyle estimated he needed $200 for food and household supplies, $200 for utilities, $30 for his medical co-payment, and $100 for computer and internet supplies. Overall, his monthly expenses were $1620. Additionally, he listed a $4000 debt owed to a family friend for money borrowed by Mother on Kyle's behalf to pay the action's attorney fees.

The family court judge found the "Other Benefits for Children" clause ambiguous. The testimony of Mother and Father was received on the issue of intent. Father testified he earns $72,000 per year as an employee of Duke Energy, where he has worked for twenty five years. The Duke Energy stock referenced in the Agreement began as a stock benefit account but later changed to a 401(k). At the time of the hearing, the stock had split and was worth approximately $60,000. He explained the disposition of the stock at the time Mother and Father entered the Agreement:

Q: [W]as that part of the equitable division of marital property with [Mother], your ex-wife?

A: Yeah, that was set aside yes, to help pay for things, educational things, or things that they needed, as they grew up from the time we separated.

Q: Okay. So in lieu of her taking a percentage of stock, y'all were essentially holding it in trust for your kids; is that right?

A: We set aside that amount to help with the kids.

Father stated he did not understand "educational needs" as used in the Agreement to be college. His understanding of "other necessities for children" included "[c]lothes, things they need in school, food when they don't have money for food, power…."

Father presented the family court with a list of miscellaneous expenditures made on behalf of the children in years past. The list, admittedly prepared for the purpose of the hearing, included such items as trips to the beach and amusement parks, musical instruments, a Play Station, and a go-cart. Father argued these were "other necessities" and asserted his $36,000 obligation should be set off accordingly. He admitted he never communicated to Mother or Kyle that the expenses were to be counted towards the shares of stock he owned.

Mother was currently seeking disability due to temporal arthritis and collagen vascular disease. She had been residing with her aging parents in North Carolina, returned to South Carolina to help Kyle after his emotional problems intensified, and planned to return to her parents' home. She testified the Agreement provided for the children's college education.

The family court judge ruled: the Agreement was ambiguous but (1) the intent was to include college expenses as indicated by the testimony of Mother and Father; (2) "other necessities" was intended to include living expenses incident to college; (3) Father agreed to pay up to $36,000, the

stock's value at the time of the Agreement; (4) the older child did not seek benefits under the Agreement; and (5) the Agreement contained no requirement the children mitigate expenses or work.

The order mandated:

> Defendant/father shall pay directly to Kyle Nicholson the sum of $800.00 per month for the months of January through May 2007 and for the months of September through December 2007, yet equating to nine (9) months a year. The Defendant/father shall do the same for next year. Kyle Nicholson shall provide proof to his father that he is continuously enrolled full time to obtain the money.
>
> [A]fter Kyle Nicholson's two (2) years at Tri-County Technical College, there shall be a balance left from the agreement in the amount of $21,600.00 for his last two (2) years of college, or eighteen (18) months for a sum of $1,200 per month.
>
> Kyle Nicholson shall be required to exhaust all grants and scholarships, but shall not be required to incur loans or minimize expenses.
>
> Kyle Nicholson shall provide a print-out to his father of his tuition, room and board, books, and his grants and scholarships.
>
> $400.00 transportation expenses shall be included in the tuition, room and board, and books. The room and board expenses shall not exceed the cost to live on campus with room and board and full meal plan.
>
> [T]he Defendant/father's obligation shall forever end if Kyle Nicholson is not continuously enrolled full time, except if he has a medical withdrawal unrelated to substance abuse. Kyle Nicholson shall not use illegal drugs and the Defendant/father shall have full discovery on that issue.

> [T]he Defendant/father shall pay attorney's fees directly to Plaintiff's attorney in the amount of $2000….
>
> Kyle Nicholson is not entitled to assistance under Risinger v. Risinger, 273 S.C. 36, 253 S.E.2d 652 (1979).

STANDARD OF REVIEW

On appeal from the family court, this court has jurisdiction to find facts in accordance with its own view of the evidence. Ray v. Ray, 374 S.C. 79, 83, 647 S.E.2d 237, 239 (2007); South Carolina Dep't of Soc. Srvcs., County of Siskiyou v. Martin, 371 S.C. 21, 24, 637 S.E.2d 310, 311 (2006); Patel v. Patel, 359 S.C. 515, 522-23, 599 S.E.2d 114, 118 (2004); Maxwell v. Maxwell, 375 S.C. 182, 184, 650 S.E.2d 680, 682 (Ct. App. 2007); Heins v. Heins, 344 S.C. 146, 151, 543 S.E.2d 224, 226 (Ct. App. 2001); Kisling v. Allison, 343 S.C. 674, 677, 541 S.E.2d 273, 275 (Ct. App. 2001); Murdock v. Murdock, 338 S.C. 322, 328, 526 S.E.2d 241, 244-45 (Ct. App. 1999). "This tribunal, however, is not required to disregard the Family Court's findings." Bowers v. Bowers, 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct. App. 2002); Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005); Badeaux v. Davis, 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct. App. 1999). "Nor must we ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." Lacke v. Lacke, 362 S.C. 302, 307, 608 S.E.2d 147, 150 (Ct. App. 2005) (citing Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003)); see also Kisling at 678, 541 S.E.2d at 275 ("[B]ecause the appellate court lacks the opportunity for direct observation of the witnesses, it should give great deference to the Family Court's findings where matters of credibility are involved."). This broad scope of review does not relieve the appellant of the burden of convincing this court the family court erred. Skinner v. King, 272 S.C. 520, 522-23, 252 S.E.2d 891, 892 (1979); Davis v. Davis, 372 S.C. 64, 74, 641 S.E.2d 446, 451 (Ct. App. 2006); Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 190, 641 S.E.2d 707, 711 (Ct. App. 2005).

ISSUES

Father argues the family court erred by:

(1) finding an enforceable agreement requiring Father to pay Kyle's college expenses including transportation;
(2) denying Father a credit towards the $36,000;
(3) finding Kyle had characteristics qualifying him to receive college funds; and
(4) awarding attorney fees to Mother and Kyle.

LAW / ANALYSIS

I. Ambiguity and Enforceability of the Agreement

Father argues there was no enforceable agreement between himself and Mother concerning Kyle's college expenses. To the extent the agreement is enforceable, Father contends the family court erred in including transportation expenses and denying him a credit. We disagree.

"In South Carolina, the construction of a separation agreement is a matter of contract law." Davis v. Davis, 372 S.C. 64, 75, 641 S.E.2d 446, 451 (Ct. App. 2006) (citing Estate of Revis by Revis v. Revis, 326 S.C. 470, 477, 484 S.E.2d 112, 116 (Ct. App. 1997)); McDuffie v. McDuffie, 313 S.C. 397, 438 S.E.2d 239 (1993); Auten v. Snipes, 370 S.C. 664, 669, 636 S.E.2d 644, 646 (Ct. App. 2006). The court's only function with an agreement that is clear and capable of legal construction is to interpret its lawful meaning and the intention of the parties as found within the agreement and to give them effect. Ecclesiastes Production Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 499, 649 S.E.2d 494, 502 (Ct. App. 2007); Davis, 372 S.C. at 75, 641 S.E.2d at 451; Auten, 370 S.C. at 669-70, 636 S.E.2d at 647; Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004); Bogan v. Bogan, 298 S.C. 139, 142, 378 S.E.2d 606, 608 (Ct. App. 1989). "In the enforcement of an agreement, the court does not have the authority to modify terms that are clear and unambiguous on their face." Messer v. Messer, 359 S.C. 614, 621, 598 S.E.2d 310, 314 (Ct. App. 2004); see also Patricia Grand Hotel, LLC v. MacGuire Enterprises, Inc., 372 S.C. 634, 641,

643 S.E.2d 692, 695 (Ct. App. 2007); Ebert v. Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); Miccichi, 358 S.C. at 93, 594 S.E. at 493; Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001) ("Unambiguous marital agreements will be enforced according to their terms.") "Where an agreement has been merged into a court's decree, the decree, to the extent possible, should be construed to effect the intent of both the judge and the parties." Messer, 359 S.C. at 628, 598 S.E.2d at 318 (citing McDuffie v. McDuffie, 308 S.C. 401, 409, 418 S.E.2d 331, 336 (Ct. App. 1992)); Davis, 372 S.C. at 75, 641 S.E.2d at 451. "A court approved divorce settlement must be viewed in accordance with principles of equity and there is implied in every such agreement a requirement of reasonableness." Ebert, 320 S.C. at 340, 465 S.E.2d at 126 (quoting 17A Am. Jur. 2d *Contracts* 479 (1991)).

"[W]hen an agreement is susceptible of more than one interpretation, it is ambiguous and the court should seek to determine the intent of the parties." Davis, 372 S.C. at 75, 641 S.E.2d at 452; Estate of Revis, 326 S.C. at 477, 484 S.E.2d at 116. "Unambiguous marital agreements will be enforced in accordance with their terms, while ambiguous agreements will be examined in the same manner as other agreements in order to determine the intention of the parties." Lindsay v. Lindsay, 328 S.C. 329, 337, 491 S.E.2d 583, 587 (Ct. App. 1997) (citing McDuffie, 313 S.C. 397, 438 S.E.2d 239 (1993)). Whether an ambiguity exists in an agreement must be ascertained from the language of the instrument. Steffenson v. Olsen, 360 S.C. 318, 322, 600 S.E.2d 129, 131 (Ct. App. 2004); Lindsay, 328 S.C. at 337, 491 S.E.2d at 587. "An ambiguous contract is one capable of being understood in more ways than one, an agreement obscure in meaning through indefiniteness of expression, or having a double meaning." Davis, 372 S.C. at 76, 641 S.E.2d at 452 (quoting Estate of Revis, 326 S.C. at 477, 484 S.E.2d at 116); Carolina Ceramics, Inc. v. Carolina Pipeline Co., 251 S.C. 151, 155-56, 161 S.E.2d 179, 181 (1968). "[W]here an agreement is ambiguous, the court should seek to determine the parties' intent." Lacke v. Lacke, 362 S.C. 302, 309, 608 S.E.2d 147, 150 (Ct. App. 2005); see also Smith-Cooper v. Cooper, 344 S.C.

289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001); Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct. App. 1998); Ebert, 320 S.C. at 338, 608 S.E.2d at 125; Mattox v. Cassady, 289 S.C. 57, 60, 344 S.E.2d 620, 622 (Ct. App. 1986) ("Like any other agreement, when the language of a settlement agreement [incorporated into a divorce decree] is susceptible of more than one interpretation, it is the duty of the court to ascertain the intention of the parties.").

> [I]t is the general rule that parol evidence is admissible to show the true meaning of an ambiguous written contract.… The courts, in attempting to ascertain [the parties'] intention, will endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into. Bruce v. Blalock, 241 S.C. 155, 127 S.E.2d 439 (1962). The court should put itself, as best it can, in the same position occupied by the parties when they made the contract. In doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language. 17 Am. Jur. 2d, *Contracts* § 272 (1964).

Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977); see also McKinney v. McKinney, 274 S.C. 95, 104, 261 S.E.2d 526, 530 (1980) ("The lower court should have resolved the ambiguity apparent on the face of the agreement by receiving testimony and evidence as to the intentions of the parties and circumstances of the agreement."); Charles v. B & B Theatres, Inc., 234 S.C. 15, 18, 106 S.E.2d 455, 456 (1959) ("[W]hen the written contract is ambiguous in its terms, . . . parol and other extrinsic evidence will be admitted to determine the intent of the parties.") (citation omitted).

Mother convincingly clarified the intent behind the provision. When asked if he understood "educational needs" to include college, Father answered "I did not." However, Father did not take the opportunity to convey to the court his understanding of the term. Rather, his filigreed answers played on the very ambiguity the hearing sought to resolve:

Q: But you don't believe that educational needs, refers to college?

A: It could.

Q: But, does it?

A: Not necessarily.

Q: Well, I'm asking you. Does it—educational needs, does it mean college, or does it not?

A: It doesn't say that.

Q: I'm asking you, what do you understand it to mean?

A: It means that I will help provide educational needs as that (sic) arise. And that's like what I said you know, help me with (sic) understand what your needs are, and what you plan to do to help.

Q: So, that could include college?

A: That could.

Contrarily, Mother stated emphatically the Agreement was drafted with the intention of enabling her children to attend college:

Q: Okay. In paragraph three, on page four of that agreement, tell us what you understood educational needs to mean, and also other necessities to mean?

A: I clearly remember having this drawn up because I have never been to college, I wanted my children to be able to go to college. So when I had this put in there, I did not know about expenses for college, I did not understand how the system worked. And this money was definitely put side for college expenses for them, whatever that meant. And other necessities at the time I would have thought that meant clearly braces, glasses, a computer….

…

Q: As far as other necessities in there, in educational needs, tell me what you understand—or understood those expenses, and how they relate?

A: Well like I said, at the time I didn't—I have—did not—wasn't familiar with college to know about anything. I was very aware that when they were 18, that knowing how children are they would want to be on their own and you must have living, eating, clothing, all those things were included—could be included in that, in the other necessities with the college expenses.

When asked what he understood "other necessities" to mean, Father answered:

A: Clothes, things they need in school, food when they don't have money to pay for their food, power—extra money that's given to them when they don't have money to pay their power bill. Things that make them survive over their time from that we separated, while they were in school.

Concerning transportation, Father was asked:

Q: If your son attends school, is it a necessity for him to get there?

A: It is.

Q: Is it a necessity for him to have transportation to get there?

A: It should be.

…

Q: So would you agree with me then that if a go-cart is a necessity, and Play Station, beach trip, Gatlinburg, if those things are a

necessity, wouldn't you agree with me that him driving to school and having a vehicle would be a necessity?

A: It could be.

Q: All right. Under this agreement?

A: It could be.

The final order of the family court judge concluded succinctly:

5. I find that the agreement is ambiguous on the issue of college expenses.

6. I find that the intent is to include college expenses, as indicated by the testimony of both parents.

7. I find that "other necessities" is intended to include living expenses while the children attend college.

8. I find that portion of the agreement stating "1,200 shares of the Duke Power Stock at its present value of [$]36,000" means that the Defendant/father has agreed to pay up to $36,000.00.

9. I find that the educational needs of the children are the priority of the agreement. The older child is emancipated and did not seek benefits under the agreement.

10. I do not find that there is a requirement in the agreement that the parties' children are required to mitigate their expenses. I find that there is no requirement in the agreement that they work and that it would be irrelevant to the agreement.

…

15. I find that $400.00 transportation expenses shall be included in the tuition, room and board, and books. The room and board expenses shall not exceed the cost to live on campus with room and board and a full meal plan.

The Agreement is enforceable and the $36,000, being for the children's education needs "first and foremost," was intended to include the costs associated with a college education. We agree transportation expenses enabling Kyle to attend classes is a necessity under the Agreement. The list Father presented to the family court purporting to justify offsetting his obligation is not convincing. He admittedly prepared the list for the hearing, and at no time over the years did he communicate his outlays were being made pursuant to the Agreement. Although the list is not in the record and the family court did not specifically rule upon it, the items revealed in Father's testimony are not in keeping with the educational needs and other necessities intended in the Agreement. Accordingly, we find no error in denying Father a credit.

II. Characteristics to Benefit From College

Father avers the family court erred by finding Kyle had characteristics qualifying him to receive college funds. This argument is not preserved, but would fail had it been.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 714 (2004); Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 33-34, 491 S.E.2d 571, 576 (1997); Bowers v. Thomas, 373 S.C. 240, 247, 644 S.E.2d 751, 754 (Ct. App. 2007); Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005). The imposition of the preservation requirement upon an appellant is designed to enable the lower court to rule properly after consideration of all relevant facts, law and arguments. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000); I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "An issue is not preserved where the trial

court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment." Doe v. Roe, 369 S.C. 351, 376, 631 S.E.2d 317, 330 (Ct. App. 2006), cert. denied Oct. 18, 2006. "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004).

The argument that Kyle lacks characteristics qualifying him to receive college funds was not raised prior to this appeal. Father acknowledges in his brief that the family court did not specifically state Kyle had characteristics indicating he would benefit from college. Rather, he contends the asseveration is "implicit in its order." In the pleadings, Mother and Kyle alleged that Kyle demonstrated the ability to do well at college, would benefit, and has or would apply for grants and scholarships. In response to this paragraph, Father denied the allegations claiming to be without sufficient knowledge to form a belief and demanding strict proof. Nonetheless, Father testified to Kyle's aptitude:

> Q: Okay. Do you agree with me, that your son has the ability to do well in school?
>
> A: Very much so.
>
> Q: Do you think college would benefit him?
>
> A: I do.
>
> Q: Okay. Do you want him, to do well?
>
> A: I do, I've encouraged it.

Additionally, Father conceded if Kyle was struggling with depression and using drugs like marijuana, "some of the best cures" were a stable education and gaining a better life. Father's motion to reconsider focused solely on the grounds the family court failed to adequately consider the Agreement's ambiguity and the intentions of the parties.

Father relies on Risinger v. Risinger, 273 S.C. 36, 253 S.E.2d 652 (1979), where our supreme court articulated a non-exclusive list of circumstances under which a family court may order a parent to pay for a child's college education. The Risinger court held:

> [A] family court may require a parent to contribute that amount of money necessary to enable a child over 18 to attend high school and four years of college, where, as here, there is evidence that: (1) the characteristics of the child indicate that he or she will benefit from college; (2) the child demonstrates the ability to do well, or at least make satisfactory grades; (3) the child cannot otherwise go to school; and (4) the parent has the financial ability to help pay for such an education.

Id. at 39, 253 S.E.2d at 653-54. However, the family court judge explicitly stated Kyle was not entitled to assistance under Risinger. Instead, the judge cited Lacke v. Lacke, 362 S.C. 302, 608 S.E.2d 147 (Ct. App. 2005), in ruling that Kyle "shall be required to exhaust all grants and scholarships, but under [Lacke] Kyle Nicholson is not required to incur loans or minimize expenses."

In Lacke, an agreement in a divorce decree required both parents to pay for the children's "college education," a term found ambiguous as to which expenses were included. This court ruled when a parent voluntarily enters an agreement to assume a child's college education, the child has no obligation to minimize expenses, take on student loans, or contribute their own income unless the agreement so provides. Id. at 314, 608 S.E.2d at 153. We explicated Lacke was "governed by the parties' agreement. Consequently, Risinger … [was] inapplicable. Pursuant to Risinger, the family court may order a parent to pay for a child's education **where no agreement to pay exists**." Lacke, 362 S.C. at 313, 608 S.E.2d at 153 (emphasis added). As in Lacke, this controversy is governed by the Agreement and, thus, the Risinger analysis is inapplicable.

III. Attorney Fees

Father contends the family court erred in awarding attorney fees to Mother and Kyle. Specifically, Father argues the award should be reversed because the family court failed to explain its reasoning and consider the appropriate factors. Counsel for Mother and Kyle submitted an affidavit requesting attorney fees of $4220 plus costs and fees totaling $235. The family court judge ordered Father to pay $2000, stating at the hearing, "I find that [Father] presented credible evidence of his attempts to resolve this without litigation, and his offers of support. I also believe Kyle should take some responsibility for where he finds himself." The final order merely offered, "I find that Defendant/father was credible on his attempts to resolve some issues with his son." Although the family court does not fully articulate its reasoning or contemplate the related factors, this error does not necessitate reversal.

Attorney fees may be assessed against a party in an action brought in family court. S.C. Code Ann. § 20-7-420(A)(38) (Supp. 2005). The award of attorney fees is at the sound discretion of the family court. Patel v. Patel, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004); Lanier v. Lanier, 364 S.C. 211, 221, 612 S.E.2d 456, 461 (Ct. App. 2005); Lacke, 362 S.C. at 317, 608 S.E.2d at 154. "An award of attorney's fees will not be overturned absent an abuse of discretion." Shirley v. Shirley, 342 S.C. 324, 341, 536 S.E.2d 427, 436 (Ct. App. 2000) (citing Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988)); see also Arnal v. Arnal, 363 S.C. 268, 290, 609 S.E.2d 821, 833 (Ct. App. 2005); Wynn v. Wynn, 360 S.C. 117, 126, 600 S.E.2d 71, 76 (Ct. App. 2004). "In deciding whether to award attorney's fees, the family court should consider: (1) the parties' ability to pay; (2) the beneficial results obtained by counsel; (3) the respective financial conditions of the parties; and (4) the effect of the fee on each party's standard of living." Lacke, 362 S.C. at 317, 608 S.E.2d at 154 (citing E.D.M. v. T.A.M, 307 S.C. 471, 415 S.E.2d 812 (1992)); Davis v. Davis, 372 S.C. 64, 88, 641 S.E.2d 446, 458 (Ct. App. 2006); Bowers v. Bowers, 349 S.C. 85, 99, 561 S.E.2d 610, 617 (Ct. App. 2002). Our supreme court has identified the following factors for determining the amount of reasonable attorney fees: (1) the nature, extent, and difficulty of the case; (2) the time devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5)

beneficial results; and (6) customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991). In Griffith v. Griffith, 332 S.C. 630, 506 S.E.2d 526 (Ct. App. 1998), where an award of attorney fees in a divorce action did not set forth the findings of fact on the six required factors pursuant to Glasscock, we inculcated:

> Our case law and court rules make clear that when a contract or statute authorizes an award of attorney's fees, the trial court must make specific findings of fact on the record for each of the required factors to be considered. Rule 26(a), SCRFC ("An order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision."); Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993) (attorney's fees award pursuant to contract); Atkinson v. Atkinson, 279 S.C. 454, 309 S.E.2d 14 (Ct. App. 1983) (per curiam) (attorney's fees award pursuant to divorce decree authorized by statute). Generally, if on appeal there is inadequate evidentiary support for each of the factors, the appellate court should reverse and remand so the trial court may make specific findings of fact. Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993). However, when an order from the family court is issued in violation of Rule 26(a), SCRFC, the appellate court "may remand the matter to the trial court, **or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence**." Holcombe v. Holcombe, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991).

Griffith at 646-47, 506 S.E.2d at 534-35 (emphasis added); see also Doe v. Doe, 370 S.C. 206, 218, 634 S.E.2d 51, 58 (Ct. App. 2006); Badeaux v. Davis, 337 S.C. 195, 203, 522 S.E.2d 835, 839 (Ct. App. 1999).

Through this court's plenary powers of review, we find the decision to award attorney's fees is supported by the record. Neither Mother nor Kyle had the ability to pay the fee to bring this action without borrowing money from a friend. Their counsel obtained beneficial results. Whereas Father has been with his employer for many years and was currently earning $72,000

per year, Mother and Kyle were unemployed. Mother was seeking disability and Father admitted Kyle's school attendance would inhibit his ability to work. Given Mother's and Kyle's strained financial circumstances, the effect of owing the full attorney fees would more adversely affect their standard of living than it would Father's as a result of his required $2000 contribution.

The attorney's fee affidavit specifically called the family court's attention to the Glasscock factors:

> 4. [Counsel] incorporates herein Rule 407 of the South Carolina Appellate Court Rules which contains the Rules of Professional Conduct and further calls the attention of the Court to the holding of Glasscock v. Glasscock, 403 S.E.2d 313 (S.C. 1991), concerning the factors and criteria which should be considered in the setting of attorney's fees. He relies upon the discretion of the Court in the determination of the amount of fees, based, among other things, upon the Court's file, the Court's knowledge of the litigation between the parties, which reflects the difficulty of the services rendered, the time necessarily expended, the result accomplished, the fact that there is no contingency of compensation in a domestic relations case, the professional standing of counsel, and fees customarily charged in this area for similar legal services.

In the case at bar, where the controversy was based on an alleged ambiguity in the Agreement, the parties' testimony regarding intent was the centerpiece of its resolution. The affidavit stated counsel for Mother and Kyle spent 21.10 hours preparing the pleadings and affidavits and readying for the hearing. Counsel provided he was admitted to the South Carolina Bar ten years earlier and had since been in private practice. Concerning his professional standing, he was an active member of the state bar and other professional legal associations. Contingency of compensation was not applicable in this domestic action. Mother and Kyle's counsel secured beneficial results for his clients. Although no indication of customary legal fees for similar services appears, the record sufficiently supports the

Glasscock factors. Accordingly, $2000 is a reasonable award, and we find no abuse of discretion.

CONCLUSION

The Agreement is enforceable and was intended to provide for the children's educational needs and other necessities. Under the circumstances of this case, transportation is a necessity enabling Kyle to attend classes. We rule Father must pay Kyle the sum of $800 per month, including transportation expenses of $400, for the months of January through May 2007 and September through December 2007, equating to nine months per year. Father shall do the same for 2008. After Kyle's first two years of college, Father shall apply the $21,600 balance towards Kyle's last two years, or eighteen months at a sum of $1200 per month. Father is not entitled to a credit towards the $36,000 he owes. The record provides ample evidence to support the award of attorney fees. Accordingly, the order of the family court is

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shawn M. Swicegood, Respondent,

v.

Leon Lott, in his official capacity as Sheriff of Richland County, Appellant.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4405
Heard April 9, 2008 – Filed June 6, 2008

AFFIRMED

Andrew F. Lindemann, Robert D. Garfield, William H. Davidson, II, of Columbia, for Appellant.

S. Jahue Moore, of West Columbia, for Respondent.

HEARN, C.J.: Sheriff Leon Lott, in his official capacity as Sheriff of Richland County, appeals the circuit court's failure to grant his motions for

directed verdict and judgment notwithstanding the verdict (JNOV), as well as his post-trial motions for a new trial absolute and new trial nisi. We affirm.

FACTS

The Richland County Sheriff's Department (Department) was conducting an investigation on a former deputy, Brian Gailey, based on allegations of criminal activity. The Department became convinced then-current deputy Shawn Swicegood had information on Gailey because the two were friends and former co-workers. Upon arriving at work on February 28, 2003, Swicegood was taken into the office of Chief Investigator David Wilson for questioning. Swicegood repeatedly denied having any knowledge of Gailey's alleged illegal activity.

Wilson did not believe Swicegood, asking him if he would submit to a polygraph examination. Swicegood agreed, and ultimately was administered three polygraph exams, which the Sheriff's Department believed indicated Swicegood had not told the truth. In preparation for the polygraph, Swicegood told the examiner he was in possession of an unauthorized assault rifle which he had built from scrap metal pieces. The Department contacted the Bureau of Alcohol Tobacco and Firearms, and federal weapons charges were initiated against Swicegood, to which he ultimately pled guilty and served eighteen months in federal prison.

On the same day, and after Swicegood's interrogation had begun, Department Captain James Stewart, at Wilson's direction, began looking into the hours Swicegood had reported on his Department timesheet. Specifically, Stewart was directed to compare Swicegood's reported hours as a deputy, against the hours Swicegood had reported participating in the Department's Special Duty Program. The program, also known as moonlighting, was encouraged by the Department as an opportunity for deputies to find extra work to supplement their incomes. Swicegood participated in the moonlighting program, including providing security at a Cash-O-Matic location. Stewart's investigation ultimately yielded three instances where Swicegood's security moonlighting overlapped with hours he had submitted

to the Department for his deputy duties.[1] These instances were for fifteen minutes each, and because Stewart believed this represented a pattern, he did not approach Swicegood in order to allow him a chance to explain the discrepancies. Instead, Stewart went to a magistrate and swore out three warrants for Swicegood's arrest for obtaining signature or property by false pretenses.

The three warrants were then given to Wilson to serve on Swicegood during the still ongoing interrogation. Throughout the interrogation, Wilson stated he would make both the state and federal charges "go away" if Swicegood would give the information that the Department wanted on Gailey. When Swicegood refused to perjure himself, he was arrested, and spent approximately the next eighteen hours in jail. By the time Swicegood posted bail, reports of his arrest and charges had been given by the Department to The State newspaper, other news agencies, and were posted on the internet.

Swicegood brought an action for false arrest, malicious prosecution, abuse of process, and negligence against Lott in his official capacity. On summary judgment motion, the circuit court dismissed Stewart as a defendant, and dismissed all causes of action against Lott except for the abuse of process claim. A jury trial was held only on the abuse of process action which resulted in a $150,000 jury verdict in favor of Swicegood. This appeal followed.

STANDARD OF REVIEW

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one

[1] Based on Swicegood's annual wage at the time, each alleged instance amounted to $3.75 of "double-dipping." Additionally, testimony indicates it was common practice to fill out timesheets with expected hours at the beginning of each month, before actually working the hours.

inference or its inference is in doubt." Law v. S.C. Dept. of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). An appellate court will only reverse the trial court's ruling on a JNOV motion when there is no evidence to support the ruling or where it is controlled by an error of law. Id. at 434-35, 629 S.E.2d at 648

LAW/ANALYSIS

I. Sovereign Immunity Under S.C. Code Ann. § 15-78-60(17)

Lott contends the circuit court erred in denying his motions for a directed verdict and judgment notwithstanding the verdict (JNOV) on the grounds that he is entitled to sovereign immunity pursuant to an exception of the general waiver of immunity under the South Carolina Tort Claims Act.[2] Specifically, Lott maintains an action for abuse of process necessarily involves alleging elements of actual malice and intent to harm, for which he would be entitled to immunity as a matter of law under Section 15-78-60(17) of the South Carolina Code (2005). We disagree.

The tort of abuse of process consists of two elements: an ulterior purpose, and a willful act in the use of the process that is not proper in the regular conduct of the proceeding. Hainer v. Am. Med. Int'l, Inc., 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). In explaining the elements of abuse of process, the circuit court charged the jury that Swicegood must prove by a greater weight or preponderance of the evidence that Lott "had some ulterior purpose or bad intent." Additionally, in explaining the second element of the tort, the circuit court explained "it is the malicious misuse or perversion of the process for a result that's not legitimate for its purpose that constitutes an abuse of process."

Section 15-78-60(17) provides: "The governmental entity is not liable for a loss resulting from . . . (17) employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." (emphasis added). Thus, Lott

[2] S.C. Code Ann. § 15-78-10 (2005).

contends, the preceding jury charge necessarily involves a finding of both malicious conduct sufficient to rise to the level of actual malice, and intent to harm. As stated above, the tort of abuse of process contains neither an element of intent to harm, nor actual malice. Although harm may result from the "bad intent" used by the circuit court to describe an ulterior purpose, proving an abuse of process claim does not require a party to intend such harm. See Eldeco, Inc. v. Charleston County Sch. Dist., 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007) (finding the comparable torts of tortious interference with contractual relations, and intentional interference with prospective contractual relations do not contain an intent to harm element providing immunity under § 15-78-60(17)).

Similarly, there is no required element of actual malice. Actual malice in this situation refers to common law actual malice, and has been defined by situations where "defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff." Jones v. Garner, 250 S.C. 479, 488, 158 S.E.2d 909, 914 (1968); see also Hubbard and Felix, The South Carolina Law of Torts, p. 398. The improper purpose element of an abuse of process claim usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself. Therefore, it is the use of the process to coerce or extort that is the abuse, and need not be accompanied by any ill will. As the tort of abuse of process does not require a finding of actual malice or intent to harm, the circuit court did not err in denying Lott's motions for directed verdict and JNOV as to his immunity under § 15-78-60(17).

II. Arrest Warrants Carried To Their Authorized Conclusion

Lott next contends the circuit court erred in failing to grant his motions for directed verdict and JNOV because the process had been carried to its authorized conclusion. We disagree.

Lott maintains that because the arrest warrants obtained by Stewart for the alleged double-dipping were carried to their authorized conclusion, i.e., Swicegood was taken to trial and the charges were ultimately dismissed, then there should be no liability for the tort of abuse of process. This logic is

misplaced. Lott relies upon the isolated statement in Guider v. Churpeyes, Inc. that "[r]egardless, there is no liability when the process has been carried out to its authorized conclusion, even though with bad intentions." 370 S.C. 424, 432, 635 S.E.2d 562, 566 (Ct. App. 2006) (emphasis added). However, this statement should not be interpreted to mean that no liability may ever arise where the process is carried to its authorized conclusion. Indeed, the essence of the tort of abuse of process centers on events occurring outside of the process, namely:

> The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.

Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967) (citation omitted). The existence of probable cause for the double-dipping arrest warrants is not in dispute. Nonetheless, there is clearly evidence in the record the Department initiated the investigation into Swicegood's moonlighting with the intent of coercing him into implicating Gailey. The "willful act" element of the abuse of process tort has been interpreted by this court to consist of three different components: 1) an act that is either willful or overt; 2) in the use of the process; 3) that is ultimately reprehensible because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective. Food Lion, Inc. v. United Food & Commercial Workers Intern. Union, 351 S.C.65, 71, 567 S.E.2d 251, 254 (Ct. App. 2002). The evidence before us is sufficient to create a jury question as to both the ulterior purpose element and all three aspects comprising the willful act element.

Our decision that a jury issue was created on the peculiar facts of this case should not be interpreted to chill law enforcement activity in its

legitimate procurement of cooperation to further investigations. The eliciting of cooperation from an accused in one case in exchange for leniency with existing charges, where the accused genuinely has information that would benefit law enforcement, does not, and never has fallen within the tort of abuse of process. Here, however, taking the facts in the light most favorable to Swicegood, as we must for the purposes of evaluating this issue at the directed verdict and JNOV stage, the evidence is susceptible to the inference that the primary purpose of the investigation and issuance of warrants was to coerce or extort Swicegood's testimony against Gailey, even though he had previously indicated he had no knowledge that would further the Department's investigation. Thus the facts of this case are distinguished from normal police investigative procedure. As a result, the circuit court did not err in denying Lott's motions on this issue.

III. Causal Connection Between the Abuse of Process and Damages

Lott next contends the circuit court erred in denying his motions for directed verdict and JNOV because Swicegood failed to prove the causal connection between the alleged misuse of the process and his claimed damages. He maintains that under abuse of process, recoverable damages are only those resulting from the misuse of the process, but not those losses resulting from the proper use of the process.

The South Carolina Supreme Court has addressed the issue of damages in an abuse of process action in the second Huggins case to come before the court after remand and appeal. It provides an appropriate explanation of the damages recoverable from an abuse of process claim. Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969). The court concluded "[d]amages recoverable for abuse of process are compensatory for the natural results of the wrong, and may include recompense for physical or mental injury; expenses; loss of time; and injury to business, property or financial standing." Id. at 362, 166 S.E.2d at 301 (citation omitted). In finding that once abuse of process is proven, damages are recoverable, the court went on to explain that "there may be recovery without proof for harm to the plaintiff's reputation, standing and credit," as well "as to humiliation and other mental suffering or injury to [a person's] feelings." Id. at 363, 166

S.E.2d at 301 (citation omitted). Moreover, if some damage to the reputation could be considered a natural and probable consequence of the abuse of process, then submission to the jury is proper, even if there was no proof as to the damage. Id. Swicegood testified as to the frustration, embarrassment, and humiliation he experienced having to face his family, friends and members of his church, after his arrest had been leaked to the press. We find this to be sufficient evidence to support the submission of damages to the jury.

IV. New Trial; New Trial Nisi Remittitur

Lott next contends the circuit court erred in failing to grant his post-trial motion for a new trial absolute. We disagree.

A circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. Id. at 379-80, 426 S.E.2d at 805.

The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence, or the conclusions reached are controlled by error of law. Umhoefer v. Bollinger, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989). "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." Id.

Lott first maintains the circuit court erred in denying his motion for a new trial absolute because the jury's charge, which defined ulterior purpose as "bad intent," was incorrect and confusing to the jury. Lott failed to lodge an objection at the close of the jury charge. Only after the jury requested to

be re-charged on the law of abuse of process and ulterior motive did counsel take exception to the charge. See Lundy v. Lititz Mut. Ins. Co., 232 S.C. 1, 10, 100 S.E.2d 544, 548 (1957) (finding an objection was waived as untimely, where counsel did not object at the conclusion of the main charge, but later objected to additional instructions that were substantially the same as the main charge).

Lott next contends the circuit court erred because of the excessiveness of the verdict. We disagree. Swicegood lost his job, and testified as to the humiliation he felt amongst his family, friends and church members as a result of this process, and, as noted above, this is evidence of compensable damages for an abuse of process claim. The circuit court did not abuse its discretion in finding the award of $150,000 was neither so excessive as to shock the conscience, nor the result of passion, caprice, prejudice, partiality, corruption or some other improper motives.

Finally, Lott contends the circuit court erred in failing to grant his motion for a new trial nisi remittitur. Although Lott claims to have made a nisi motion, and that it was denied by the circuit court, a review of the record before us finds no motion for a new trial nisi. As a result, this issue is unpreserved for our review. See Peterson v. Richland County, 335 S.C. 135, 515 S.E.2d 553 (Ct. App. 1999) (although brief indicated that a motion to reconsider was filed and denied, neither the motion nor the order were in the record on appeal).

We hold the circuit court did not err in failing to grant Lott's motions for directed verdict and JNOV, or his post-trial motions for a new trial absolute and new trial nisi. Accordingly, the decision of the circuit court is

AFFIRMED

PIEPER, J., and GOOLSBY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina, **Respondent,**

v.

Lance Lyles, **Appellant.**

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 4406
Heard June 3, 2008 – Filed June 6, 2008

AFFIRMED

Tara Dawn Shurling, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

ANDERSON, J.: Lance Lyles (Lyles) appeals his convictions for murder, attempted first degree burglary, attempted armed robbery, and possession of a pistol by a person under the age of twenty-one. Lyles

contends that the circuit court erred by excluding the proffered testimony of two defense witnesses because the exclusion constituted an abuse of discretion by denying Lyles his due process right to present witnesses in his own defense. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On December 8, 2004, two men approached the apartment of Clarence Spicer (Spicer) in Spartanburg, South Carolina. At the time, Spicer, known as "See" or "C.", and the victim, Tavaris Howze (Howze), were the only people inside the apartment. Spicer recounted the events:

> [T]wo guys came up to my door, one of them with a mask and a gun and the other with a hood covering his face.
>
> I opened the door and saw that. One of the guys tried to step in. I stopped him on his way in. The other guy came from the side with a gun and a mask on, and I started trying to close the door. And while I was closing the door one of them shot inside of my house, and that's when [Howze] was shot.

Spicer called 911 and waited for the authorities. Upon their arrival, police officers discovered Howze's body in the apartment with a gunshot wound to the head. Howze died from his injuries.

At the time of the shooting, Spicer did not recognize either of the men. However, he later recalled the identity of the individual in the hood as Lance Lyles because Lyles had visited Spicer's apartment several weeks beforehand. Spicer relayed Lyles' identity to the police and an arrest warrant was issued. Police officers then approached Lyles and a chase ensued. He was subsequently apprehended and arrested. Spicer was able to identify Lyles as one of the assailants from a photographic lineup and again at trial. Following the arrest, police searched Lyles' residence and discovered multiple rounds of ammunition in various sizes, several shell casings, and a jacket containing a ski mask.

Several days after Lyles' arrest, Joshua Jeter (Jeter) was arrested as Lyles' accomplice to the crimes. Jeter indicated he and Lyles had been outside of Spicer's apartment on the night of the incident and Jeter was wearing a ski mask. However, Jeter did not admit he was carrying a firearm at the scene until making another statement almost a year after his arrest. In the latter statement, Jeter conceded he carried a pistol to the apartment but claimed it was a different caliber than the weapon that killed Howze.

Both Lyles and Jeter were indicted for several offenses including murder, burglary in the first degree, armed robbery, and unlawful possession of a pistol by a person under the age of twenty-one. At trial, both individuals testified in their own defense. Lyles and Jeter gave conflicting accounts of the incident with each inculpating the other as the shooter. However, each corroborated they had originally gone to the apartment to purchase drugs from Spicer and had no intention of robbing him.

Both men were convicted of murder, attempted burglary in the first degree, attempted armed robbery, and unlawful possession of a pistol by a person under the age of twenty-one. Lyles was sentenced to life for murder and other consecutive sentences for the lesser offenses.

ISSUE

Did trial judge err in excluding testimony as unfairly prejudicial and irrelevant when the proffered statements went to establishing (1) drugs were previously sold from the apartment where the incident occurred and (2) drugs were present in the apartment at the time of the incident?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005) (citing State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004)); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004); State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004). "This court is bound by the trial court's factual findings unless they are clearly

erroneous." Preslar, 364 S.C. at 472, 613 S.E.2d at 384; accord State v. Bacchus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2005) (citing State v. Quattlebaum, 338 S.C. 441, 442, 527 S.E.2d 105, 111 (2000)). The appellate court does not re-evaluate the facts based on its own view of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. State v. White, 372 S.C. 364, 372, 642 S.E.2d 607, 611 (Ct. App. 2007) (citing Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Mattison, 352 S.C. 577, 583, 575 S.E.2d 852, 855 (Ct. App. 2003)); Preslar, 364 S.C. at 472, 613 S.E.2d at 384.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001); accord State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (citing State v. Bailey, 276 S.C. 32, 37, 274 S.E.2d 913, 916 (1981)); Wright v. Craft, 372 S.C. 1, 33, 640 S.E.2d 486, 503 (Ct. App. 2006); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-250 (Ct. App. 2006); State v. Broadus, 361 S.C. 534, 539, 605 S.E.2d 579, 582 (Ct. App. 2004). "A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 362 S.C. 93, 610 S.E.2d 494 (2005); accord Preslar, 364 S.C. at 472, 613 S.E.2d at 384; State v. McLeod, 362 S.C. 73, 79, 606 S.E.2d 215, 218-219 (Ct. App. 2004); State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000); State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999); State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999); see State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) ("The trial judge's decision to admit or exclude the evidence is reviewed on appeal under an abuse of discretion standard."); State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998) ("[I]n order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown."). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460,

463, 545 S.E.2d 282, 284 (2001) (citing Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995)); accord State v. Edwards, 374 S.C. 543, 553, 649 S.E.2d 112, 117 (Ct. App. 2007); State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 204-205 (Ct. App. 2007); State v. Douglas, 367 S.C. 498, 507, 626 S.E.2d 59, 64 (Ct. App. 2006); State v. Adkins, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (Ct. App. 2003).

"To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." White, 372 S.C. at 374, 642 S.E.2d at 611 (citing Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)); accord Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). "Error is harmless when it 'could not reasonably have affected the result of the trial.' " State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)); accord State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991); Broadus, 361 S.C. at 542, 605 S.E.2d at 583; State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003); see also Chapman v. California, 386 U.S. 18, 22 (1967) ("[S]ome constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."); State v. Rice, 375 S.C. 302, 316. 652 S.E.2d 409, 415 (Ct. App. 2007) ("The commission of legal error is harmless if it does not result in prejudice to the defendant."); Visual Graphics Leasing Corp., Inc. v. Lucia, 311 S.C. 484, 489, 429 S.E.2d 839, 841 (Ct. App. 1993) ("An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant."). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, [an appellate] court should not set aside a conviction because of errors not affecting the results." Broadus, 361 S.C. at 542, 605 S.E.2d at 583 (citing Hill v. State, 350 S.C. 465, 472, 567 S.E.2d 847, 851 (2002)).

LAW/ANALYSIS

Lyles avers the exclusion of testimony regarding prior drug sale solicitations at the apartment where the shooting occurred and the presence of

drugs next to the victim constituted an abuse of discretion by the trial judge and was a denial of his due process rights. We disagree.

A. How the Issue was Raised

At the nascency of trial, the State anticipated the attorneys for both Lyles and Jeter were planning to address alleged drug use at Spicer's apartment. In response, the State made a motion in limine for the court to exclude any comments regarding drug use or the existence of drugs at the apartment and to preclude any questions related to this subject matter. The trial judge agreed to limit opening statements by barring any reference to drug use or presence. Additionally, the judge required the defense to establish the relevancy of any drug evidence before the topic could be introduced at trial.

At the outset of the defense's case, Jeter and Lyles proffered the testimony of an individual (Neighbor) who lived in the apartment next door to Spicer at and before the time of the incident. Outside the presence of the jury, Neighbor testified an individual called C.C. attempted to sell drugs to him and a friend as they approached Neighbor's apartment. This solicitation occurred several months preceding the shooting. Neighbor further stated C.C. stayed in the apartment rented by Spicer but did not know if C.C. lived there. Neighbor failed to identify Spicer as C.C. when asked if C.C. was present in the courtroom.

The State objected and the trial judge conducted an inquiry to determine the relevance of the testimony. Defense counsel for Jeter argued the testimony established drugs were being sold out of Spicer's apartment and bolstered the credibility of Lyles and Jeter by supporting their claim they went to the apartment to purchase drugs. The trial judge excluded the testimony after making the following determination:

> Well, I think I understand the purpose for which it is offered, but I find that it's not -- it is certainly prejudicial as to the state. And whatever probative value might result is clearly outweighed by that prejudicial effect, not to mention the fact that I don't find it to be relevant in any fashion in this case.

Later in the defense's case, Lyles and Jeter attempted to introduce an expert who planned to testify that a partially-smoked cigarette found in the apartment contained marijuana. The State objected. The trial judge sustained the objection after determining the evidence was irrelevant because no drugs other than the partially-smoked cigarette were found at the scene.

B. Relevancy of Evidence

Lyles maintains the exclusion of the testimony was an abuse of discretion. We disagree.

The South Carolina Rules of Evidence offer guidance on the admissibility of proffered testimony. Hamilton, 344 S.C. at 357, 543 S.E.2d at 593. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, [the rules of evidence], or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. "Evidence which is not relevant is not admissible." Id. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Rules 401 and 403, SCRE, are identical to their federal counterparts and consistent with South Carolina common law." Hamilton, 344 S.C. at 357, 543 S.E.2d at 593 (citing Rules 401 & 403, SCRE (advisory committee's notes)). "Rule 402, SCRE, is identical to the federal rule, except as amended to reference South Carolina law." Hamilton, 344 S.C. at 357, 543 S.E.2d at 593 (citing Rule 402, SCRE (advisory committee's note)).

Only evidence found to be relevant should be admitted. Hamilton, 344 at 353, 543 S.E.2d at 591. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." Preslar, 364 S.C. at 476, 613 S.E.2d at 386 (citing In

re Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); Adams, 354 S.C. at 378, 580 S.E.2d at 794); accord State v. Cheeseboro, 346 S.C. 526, 548, 552 S.E.2d 300, 311 (2001); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation. See State v. Pipkin, 359 S.C. 322, 326, 597 S.E.2d 831, 833 (Ct. App. 2004); see also Rule 403, SCRE.

When evidence's prejudicial effect outweighs its probative value, it should be excluded, even if otherwise relevant. Rule 403, SCRE; State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999); State v. Crocker, 366 S.C. 394, 408, 621 S.E.2d 890, 898 (Ct. App. 2005); State v. Fletcher, 363 S.C. 221, 242, 609 S.E.2d 572, 583 (Ct. App. 2005); McLeod, 362 S.C. at 81, 606 S.E.2d at 219-220. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998); accord Wilson, 345 S.C. at 7, 545 S.C. at 830; Fletcher, 363 S.C. at 242, 609 S.E.2d at 583 (citing State v. Sweat, 362 S.C. 117, 128, 606 S.E.2d 508, 514 (Ct. App. 2004)); see State v. Bright, 323 S.C. 221, 226, 473 S.E.2d 851, 854 (Ct.App.1996) ("Unfair prejudice from the introduction of evidence occurs when it has an undue tendency to induce a decision on an improper basis.").

When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876, (2007) (citing State v. Bell, 302 S.C. 18, 30, 393 S.E.2d 364, 371 (1990)). To make this finding, trial judges are given wide discretion in ruling on the relevancy of evidence. State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); State v. Sosebee, 284 S.C. 411, 413, 326 S.E.2d 654, 656 (1985); State v. Jeffcoat, 279 S.C. 167, 170, 303 S.E.2d 855, 857 (1983); Hamilton, 344 S.C. at 353, 543 S.E.2d at 591; see State v. Anderson, 253 S.C. 168, 182, 169 S.E.2d 706, 712 (1969) ("[T]he trial judge must have wide discretion on the innumerable questions of relevancy before him."); see also State v. Perry,

359 S.C. 646, 649 n.6, 598 S.E.2d 723, 725 n.6 (Ct. App. 2004) (noting any decision concerning the relevance of evidence is within the discretion of the trial court). In State v. Hamilton, 344 S.C. at 357-358, 543 S.E. 2d at 593-594, we addressed the broad deference our Court must give when reviewing a trial judge's decision pursuant to Rule 403, SCRE:

> A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in "exceptional circumstances." United States v. Green, 887 F.2d 25, 27 (1st Cir. 1989). See also State v. Slocumb, 336 S.C. 619, 633, 521 S.E.2d 507, 514 (Ct. App. 1999) (in addressing the admissibility of evidence under Rule 403, this Court stated: "[G]iven these reports were relevant and the subject of proper cross-examination, we cannot say the trial judge abused his discretion in finding the probative value of this testimony outweighed the danger for unfair prejudice."). We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. See Green, 887 F.2d at 27. See also State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) (trial judge is given broad discretion in ruling on questions concerning relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion). A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. United States v. Long, 574 F.2d 761 (3d Cir. 1978). If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal. Id.

The trial judge's decision regarding the relevancy of evidence should only be overturned for a clear abuse of discretion. Aleksey, 343 S.C. at 35, 538 S.E.2d at 256; Alexander, 303 S.C. at 380, 401 S.E.2d at 148; Jeffcoat, 279 S.C. at 170, 303 S.E.2d at 857. In Rish v. Rish, 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App. 1988), this Court enunciated what constitutes an abuse of discretion:

> It is not always easy to determine when and if a trial judge has abused his discretion. Overly simplified, abuse of discretion involves the extent of disagreement. When an appellate court is in agreement with a discretionary ruling or is only mildly in disagreement, it says that the trial judge did not abuse his discretion. On the other hand, when the appellate court is in substantial or violent disagreement, it says that there has been an abuse of discretion.

In the case sub judice, the evidence presented by Lyles was properly excluded. The trial judge correctly found no probative link between the proffered testimony and the pending charges. Lyles was on trial for murder, burglary in the first degree, armed robbery, and unlawful possession of a pistol by a person under the age of twenty-one. The testimony put forth by the defense, if accepted, would have established drugs were offered for sale outside of the apartment several months before the shooting by an individual known only as C.C. whose true identity remains unknown to the court. Additionally, there was evidence that a small quantity of partially-smoked marijuana was found near the victim. Lyles professes this evidence shows that he and Jeter were truthful in their assertions of venturing to the apartment to purchase drugs. Defense counsel argued this went directly to the credibility of Lyles and Jeter. Nevertheless, these contentions miss the mark. Even if factual, the testimony does not serve as a defense to any of the offenses charged in this case nor does it excuse or mitigate Lyles' actions. It is not probative of any issue material to reaching a verdict. This absence of a logical connection to the facts in debate makes the evidence irrelevant and inadmissible.

Additionally, even if the testimony were relevant to the controversy, the trial judge correctly ruled it was inadmissible as unfairly prejudicial. The evidence is prejudicial because it stands to suggest a decision on an improper basis. By potentially insinuating a key witness for the State is a drug dealer and drugs were present next to the victim, the testimony could unfairly impugn the character of Spicer and Howze and cloud the issues. The risk of confusion or misdirection requires an analysis under Rule 403, SCRE. Given the tenuous probative link, the prejudicial effect outweighs any value the

evidence may hold. Moreover, we are obligated to give great deference to the decision of the trial judge in this matter and should only reverse in exceptional circumstances when there is a clear abuse of discretion. After a thorough review of the record, we find no abuse of discretion. There is no error of law in the trial judge's discretionary ruling. The details of the present case do not warrant reversal.

C. Right to Present a Defense

Lyles contends the exclusion of the testimony deprived Lyles of his due process right to present witnesses in his own defense. We disagree.

The Constitution of the United States guarantees a criminal defendant certain fundamental rights. See U.S. Const. amend. VI. "The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Gillian, 360 S.C. 433, 449-450, 602 S.E.2d 62, 71 (Ct. App. 2004); accord State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994); Schmidt, 288 S.C. at 303, 342 S.E.2d at 402. The Due Process Clause of the Fourteenth Amendment ensures these rights are extended to criminal defendants in state courts. See U.S. Const. amend. XIV; Pointer v. Texas, 380 U.S. 400, 403-404 (1965) (holding the Sixth Amendment applicable to the states through the Fourteenth Amendment); Mizzell, 349 S.C. at 330, 563 S.E.2d at 317 ("The Sixth Amendment is applicable to the states through the Fourteenth Amendment.").

Our State's Constitution and legislature have further ensured individuals accused of a crime will enjoy these rights. The Constitution of the State of South Carolina asseverates:

> The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses

> in his favor, and to be fully heard in his defense by himself or by his counsel or by both.

S.C. Const. art. 1, § 14; see also S.C. Const. art. 1, § 3 (due process rights). Additionally, the South Carolina Code confirms these guarantees by allowing criminal defendants to compel witnesses to appear in their favor and to produce witnesses and evidence at trial. See S.C. Code Ann. § 17-23-60 (1976); S.C. Code Ann. § 19-7-60 (1976). These safeguards ensure the accused will benefit from a fair and impartial trial.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302 (1973); see also California v. Trombetta, 467 U.S. 479, 485 (1984) (finding the Due Process Clause of the Fourteenth Amendment affords criminal defendants a meaningful opportunity to present a complete defense); State v. Hutton, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct. App. 2004) (recognizing fundamental fairness requires criminal defendants be granted a meaningful opportunity to present a complete defense); State v. Harris, 311 S.C. 162, 167, 427 S.E.2d 909, 912 (Ct. App. 1993) ("Due process requires that a criminal defendant be given a reasonable opportunity to present a complete defense."). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers, 410 U.S. at 294.

In Washington v. Texas, 388 U.S. 14, 19 (1967), the United States Supreme Court elucidated the rights of an accused to present testimony:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

However, "[i]n the exercise of this right [to present a defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers, 410 U.S. at 302. "The right to present a defense is not unlimited, but must ' 'bow to accommodate other legitimate interests in the criminal trial process.' ' " Hamilton, 344 S.C. at 359, 543 S.E.2d at 594 (quoting Rock v. Arkansas, 483 U.S. 44, 55 (1987) (quoting Chambers, 410 U.S. at 295)). " 'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.' " Montana v. Egelhoff, 518 U.S. 37, 42 (1996) (quoting Taylor v. Illinois, 484 U.S. 400, 410 (1988)) (brackets in original). Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission. Hamilton, 344 S.C. at 359, 543 S.E.2d at 594.

In order to ensure only proper evidence is admitted at trial, " '[s]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.' " Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998)). This broad latitude does not allow the establishment of rules that are " 'arbitrary' or 'disproportionate to the purposes that they are designed to serve.' " Scheffer, 523 U.S. at 308 (quoting Rock, 483 U.S. at 56). However, "[w]hile the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Holmes, 547 U.S. at 326; see Crane v. Kentucky, 476 U.S. 683, 689-690 (The Constitution grants trial judges ruling on the admissibility of evidence " 'wide latitude' to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.' ") (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (ellipsis and brackets in original)); see also Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) ("[T]he Due Process Clause does not permit the federal

courts to engage in a finely-tuned review of the wisdom of state evidentiary rules[.]"); Spencer v. Texas, 385 U.S. 554, 563-564 (1967) (While the Due Process clause guarantees "the fundamental elements of fairness in a criminal trial", the United States Supreme Court is not "a rule-making organ for the promulgation of state rules of criminal procedure.").

The trial judge in the case at bar did not abuse his discretion by excluding the testimony tendered by the defense. While Lyles has a fundamental right to present a complete defense, including the right to call witnesses on his own behalf, this right does not supersede any pertinent evidentiary rules. The testimony was inadmissible as irrelevant and unfairly prejudicial under the South Carolina Rules of Evidence. These rules are consistent with the Constitution and cannot be considered arbitrary or disproportionate to the ends they serve. Lyles is not entitled to offer evidence deemed inadmissible by these rules as part of his defense. Even though Lyles was prevented from introducing certain evidence at trial, his right to present a complete defense was not abridged due to the overriding purpose of the exclusionary rules barring this testimony. Resultantly, Lyles' due process rights were not violated.

D. Harmless Error

The State advances in the alternative any error in the exclusion of the testimony was harmless. We agree.

The question of "[w]hether an error is harmless depends on the circumstances of the particular case." Mitchell, 286 S.C. at 573, 336 S.E.2d at 151; accord State v. Reeves, 301 S.C. 191, 193, 391 S.E.2d 241, 243 (1990); Douglas, 367 S.C. at 519-520, 626 S.E.2d at 70; State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). " 'No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from it relationship to the entire case.' " Thompson, 352 S.C. at 562, 575 S.E.2d at 83 (quoting Mitchell, 286 S.C. at 573, 336 S.E.2d at 151). "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." Pagan, 369 S.C. at 212, 631 S.E.2d at 267 (citing Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). "Where a review of the entire record establishes the error is

harmless beyond a reasonable doubt, the conviction should not be reversed." Thompson, 352 S.C. at 562, 575 S.E.2d at 83 (citing State v. Pickens, 320 S.C. 528, 530-531, 466 S.E.2d 364, 366 (1996); State v. King, 349 S.C. 142, 161, 561 S.E.2d 640, 650 (Ct. App. 2002)); see Mizzel, 349 S.C. at 334, 563 S.E.2d at 319 ("In determining whether an error is harmless, 'the reviewing court must review the entire record to determine what effect the error had on the verdict.' ") (quoting State v. Clark, 315 S.C. 478, 484, 445 S.E.2d 633, 636 (1994) (Toal, J. dissenting)).

" 'Harmless beyond a reasonable doubt' means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt." Mizzel, 349 S.C. at 334, 563 S.E.2d at 319 (quoting Arnold, 309 S.C. at 172, 420 S.E.2d at 842). "[I]n order to conclude that the error did not contribute to the verdict, the Court must 'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' " Lowry v. State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (quoting Yates v. Evatt, 500 U.S. 391, 403 (1991)). "When guilt is conclusively proven by competent evidence such that no other rational conclusion can be reached, [the appellate court] will not set aside a conviction because of insubstantial errors not affecting the result." State v. Kelley, 319 S.C. 173, 179, 460 S.E.2d 368, 371 (1995); accord; State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (citing State v. Livingston, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984)).

After reviewing the record, we conclude any error in the exclusion of the proffered testimony would have no impact on the outcome of the case. All the elements of the crimes charged were proven beyond a reasonable doubt and no other rational conclusion could be reached. The excluded evidence, if admitted, would have had no impact on the verdict reached by the jury. Therefore, any error committed was harmless.

CONCLUSION

We hold the testimony proffered by the defense regarding potential drugs sales at the apartment and the presence of drugs at the crime scene was irrelevant. Additionally, even if the testimony were relevant, it should be excluded under Rule 403, SCRE, as unfairly prejudicial because of its tendency to confuse the issues and mislead the jury. Because this testimony is inadmissible under the rules of evidence, Lyles was not denied an opportunity to present a complete defense by its exclusion. Furthermore, any error regarding the exclusion of the testimony was harmless. ACCORDINGLY, Lyles' convictions are

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Quail Hill, LLC, Appellant,

v.

County of Richland,
South Carolina, Respondent.

Appeal From Richland County
Roger M. Young, Circuit Court Judge

Opinion No. 4407
Heard April 9, 2008 – Filed June 6, 2008

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Clifford O. Koon, Jr., and Paul D. de Holczer,
of Columbia, for Appellant.

William H. Davidson, II, and Michael Wren,
of Columbia, for Respondent.

Hearn, C.J.: Quail Hill, LLC (Buyer) brought this action against Richland County as the result of its purchase of a 72.5 acre tract in reliance upon representations by County officers and staff regarding its zoning. The circuit court granted summary judgment to County on Buyer's claims for

equitable estoppel, negligence, negligent misrepresentation, and inverse condemnation. We believe genuine issues of material fact exist as to some of Buyer's claims and therefore affirm in part, reverse in part, and remand.

FACTS

In 2002, Buyer contacted a licensed real estate broker and authorized him to act as its agent in locating and purchasing a parcel suitable for development of a manufactured-home subdivision. Broker identified a 72.5-acre parcel as a potential site for Buyer's development.

At this time, the Richland County Planning Department, Development Services' website advised the public: "Since 1997 the department has performed the planning, zoning and land use management staff functions of county government. . . . The Development Services Counter is the key point of public contact for the planning and zoning functions of the County. It is the primary information resource of property owners and land use professionals who often need to know 'What can and can not be done with a piece of property.'" (emphasis supplied).

Accordingly, in January 2003, Broker met with the Richland County Planning Department staff (Staff) to obtain the zoning classification and permitted uses for the parcel. County's subdivision coordinator, Carl Gosline, told Broker the parcel was zoned RU (rural), a classification that permits a manufactured-home subdivision. Additionally, County tax records listed the parcel's zoning as RU.

On March 13, 2003, Buyer purchased the parcel and then surveyed, platted, and prepared it for development. In September, Buyer filed an application with the County Planning Commission for site plan approval for his proposed subdivision. Buyer's site plan requested subdividing the parcel into twenty lots for manufactured homes. The Staff Report to the Planning Commission recommended approval of Buyer's subdivision plan and included the following findings: (1) the parcel was zoned RU, (2) the proposed project's impact on traffic was well within design capacity for the access road, (3) the proposed project was compatible with adjacent

development, and (4) the project implemented objectives of the North Central Subarea Plan, including varied and low-density development initiatives. On October 6, 2003, the Planning Commission voted unanimously to approve Buyer's subdivision application and site plan. Thereafter, Buyer began marketing and selling lots for Brockington Acres.

Over a year later, after the first manufactured homes were already installed, community members contacted their county council representative and asked him to attend a neighborhood meeting at a church adjoining Brockington Acres. County's current zoning administrator, Geonard Price, accompanied the council member to the meeting, where neighbors inquired about zoning restrictions and expressed opposition to the development of Brockington Acres. Shortly thereafter, on November 14, 2004, Staff notified Buyer that Price had interpreted the official zoning map and found the parcel was zoned RS-1, a classification that prohibits manufactured homes.[1] Three days later, Price issued an order requiring Buyer to cease development of the subdivision.

On November 17, 2004, County issued its order stopping further development; however, since receiving final site plan approval from the Planning Commission in October 2003, Buyer had already sold five of the subdivision's twenty lots. Two purchasers had obtained County permits authorizing them to install manufactured homes and, in fact, two homes were already installed on the lots. Another purchaser had permits to install manufactured homes on three lots, but had not yet installed them when the County issued its order to cease development.

When Buyer contacted Staff about County's order to cease development at Brockington Acres, Staff told him to apply to county council for a zoning map amendment and assured him it would recommend approval of his request. However, just two weeks later, the Staff Report recommended the Planning Commission deny Buyer's application for a zoning map

[1] The Record indicates Price was not the County's zoning administrator in 2003 when the Planning Commission approved Buyer's subdivision plan.

amendment. At a meeting on December 2, 2004, the Planning Commission accepted the Staff Report and recommended county council deny Buyer's request for a zoning map amendment. Thereafter, county council voted unanimously to deny Buyer's application to amend the zoning map.

Buyer filed a complaint in circuit court requesting an injunction and alleging causes of action against County for equitable estoppel, negligence, negligent misrepresentation, and inverse condemnation. Buyer sought an order requiring County to change zoning of his parcel from RS-1 to RU. Alternatively, Buyer sought damages and attorney's fees. County moved for summary judgment, which the circuit court granted. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment, this court applies the same standard that governed the trial court; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); see also Rule 56(c), SCRCP. "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below." Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

LAW/ANALYSIS

I. Validity of Zoning Ordinances

Initially Buyer contends there is a material issue of fact as to whether County validly enacted its 1978 zoning ordinances. We agree with the circuit court that Buyer is statutorily barred from challenging the validity of the zoning ordinance at this juncture.

It took County thirteen months to provide the minutes from the county council meetings in 1978 wherein the zoning on the subject property was purportedly granted. While Buyer asserts certain irregularities in connection

with the approval of the zoning ordinances, the circuit court correctly held that Buyer may not now be heard to challenge the validity of the enactment of the ordinances. Section 6-29-760(D) of the South Carolina Code (2004) provides:

> No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirement of this section or with established procedures of the governing authority or the planning commission.

Accordingly, we find Buyer's argument is without merit.

II. Inverse Condemnation

Buyer next alleges the circuit court erred in granting summary judgment in favor of County on his claim for inverse condemnation. We disagree.

An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property. Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). To prevail in an action for inverse condemnation, "a plaintiff must prove an affirmative, aggressive, and positive act by the government entity that caused the alleged damage to the plaintiff's property." WRB Ltd. P'ship v. County of Lexington, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006).

The circuit court found there was "no evidence that the zoning designation [of Buyer's parcel] was changed, and at most, any representation of the zoning designation of the property by Mr. Gosline or contained in the Tax Assessor's records was a mistake." This finding is in line with Buyer's own complaint, which stated "the staff represented to [Buyer] that it had

erroneously advised [Buyer] that the subject property was zoned "RU" and that records in the development staff offices and Tax Assessor's office differed from the official zoning map."

On appeal, Buyer puts forth two alternative arguments in support of its assertion that the circuit court erred in granting County's motion for summary judgment on the inverse condemnation claim. First, Buyer contends there has never been a valid, enforceable zoning map and that therefore, it was denied the ability to develop the property as it desired without being subject to zoning restrictions. As discussed above, because Section 6-29-760(D) bars Buyer's challenge, this contention is without merit. Next, Buyer contends that County's action in informing it the zoning of the property was RU constituted a sufficient showing of an affirmative, aggressive, and positive act to establish inverse condemnation.

However, the only evidence in the record indicates that County's informing Buyer of the zoning designation for the property was merely a mistake, caused primarily by incorrect record keeping in the tax assessor's office. We have found no reported case, and Buyer has cited none, which holds that a mistake may rise to the level of an affirmative, aggressive, and positive act sufficient to constitute inverse condemnation. Accordingly, the court's grant of summary judgment to County on this cause of action is affirmed.

III. Negligence and Negligent Misrepresentation

Buyer also contends the circuit court erred in granting summary judgment in favor of County on its claims of negligence and negligent misrepresentation. We agree.

The circuit court judge, relying on the South Carolina Tort Claims Act, held that Buyer's tort claims against County were barred by sovereign immunity. S.C. Code Ann. § 15-78-40 (2005) states: "The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and

exemptions from liability and damages, contained herein." Moreover, S.C. Code Ann. § 15-78-50(b) (2005) provides: "In no case is a governmental entity liable for a tort of an employee where that employee, if a private person, would not be liable under the laws of this State." Thus, the circuit court reasoned, County is liable for the negligent administration and enforcement of its zoning ordinances only if a private person could also be held liable for breach of that same duty under South Carolina law.

We recognize that there is Federal authority which supports the circuit court's resolution of this issue. See United States v. Olson, 546 U.S. 43 (2005) (holding that under a similar provision of the Federal Tort Claims Act, the United States only waives sovereign immunity under circumstances where local law would make a private person liable in tort). Moreover, the circuit court also relied upon a recent decision from this court in granting summary judgment to County on these causes of action; however, the case relied upon was recently reversed by our supreme court. See Sloan Constr. Co., Inc. v. Southco Grassing, Inc., 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006), rev'd ___ S.C. ___, 659 S.E.2d 158 (2008) (holding that because a private person would never be liable for the failure to require bonds mandated under the "Little Miller Act," this court found Sloan had no right to sue under the South Carolina Tort Claims Act's limited waiver of sovereign immunity). Thus, no South Carolina precedent exists to support the circuit court's determination that it is necessary to have a private analogue in order for liability to exist against a governmental entity under the South Carolina Tort Claims Act. Therefore, at this premature stage of the litigation, we decline to hold that Buyer may not pursue its claims for negligence and negligent misrepresentation based on these provisions of the South Carolina Tort Claims Act.

The circuit court also based its decision to grant summary judgment on S.C. Code Ann. § 15-78-60(4) (2005), which states a governmental entity is not liable for a loss resulting from: "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies . . . ." We view Buyer's claims for negligence and negligent misrepresentation as arising from County's actions

in mistakenly advising Buyer on the applicable zoning restrictions on the 72.5 acre parcel, not as emanating from the adoption or enforcement of County's zoning ordinances; therefore, we disagree with the circuit court that this provision of the tort claims act bars Buyer's claims. Accordingly, we reverse the circuit court's grant of summary judgment on Buyer's causes of action for negligence and negligent misrepresentation.

IV. Equitable Estoppel

Finally, Buyer contends the circuit court erred in granting summary judgment to County on its claim for equitable estoppel. Specifically, Buyer argues further inquiry is needed to determine whether County should be estopped from enforcing the RS-1 zoning determination almost two years after County determined the same parcel was zoned RU and a year after it approved Buyer's site plan. We agree.

"[E]stoppel is an equitable doctrine, essentially flexible, and therefore to be applied or denied as equities between the parties may preponderate." Pitts v. N.Y. Life Ins. Co., 247 S.C. 545, 552, 148 S.E.2d 369, 372 (1966). To prevail on a claim of equitable estoppel, a party must show: "(1) a lack of knowledge[,] and the means of knowledge[,] of truth as to facts in question; (2) justifiable reliance upon the conduct of the party estopped; and (3) prejudicial change in the position of the party claiming estoppel." Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 20, 532 S.E.2d 876, 878 (2000).[2]

"The acts of a government agent that are within the proper scope of his authority may give rise to estoppel against a municipality." Charleston County v. Nat'l Adver. Co., 292 S.C. 416, 418, 357 S.E.2d 9, 10 (1987); see also Landing Dev. Corp. v. City of Myrtle Beach, 285 S.C. 216, 221, 329

[2] We note there appears to be a divergence in our state's case law as to the number of elements required to prove equitable estoppel; however, for the purposes of this appeal, we analyze this claim under the three element rubric. See e.g. McCrowey v. Zoning Bd. of Adjustment of City of Rock Hill, 360 S.C. 301, 305, 599 S.E.2d 617, 619 (Ct. App. 2004) (quoting Oswald v. Aiken County, 281 S.C. 298, 305, 315 S.E.2d 146, 151 (Ct. App. 1984)).

S.E.2d 423, 426 (1985) ("To allow the city to repudiate its former interpretation of permissible rentals and the statements of its zoning director, based upon a re-assessment of the meaning of an undefined term in the ordinance[,] would be unconscionable.").

1. Lack of Knowledge

In granting summary judgment to County on Buyer's claim of equitable estoppel, the circuit court found the zoning administrator's interpretation of the official zoning map was conclusive because: "Richland County Zoning Ordinances provide that the official zoning map of Richland County constitutes the only official description of the location of zoning district boundaries, and that the zoning administrator is the only representative on behalf of Richland County that can interpret the official zoning map." However, this finding ignores the clear import of the County's website which directs the public to the Development Services Counter as "the primary information resource of property owners and land use professionals who often need to know 'What can and can not be done with a piece of property.'" Moreover, the Frequently Asked Questions portion of the website advises the public to check the zoning of a parcel prior to its development by consulting with the Department of Development Services, and suggests that it is advisable "to meet with the Planning Staff to discuss your upcoming project." Nowhere on the website is it stated that the official zoning map must be consulted to determine a property's correct zoning designation.

Accordingly, we believe a genuine issue of material fact exists as to whether Buyer possessed the knowledge or the means to acquire the knowledge concerning the true zoning of this property. See Abbeville Arms v. City of Abbeville, 273 S.C. 491, 257 S.E.2d 716 (1979); Landing Dev. Corp., 285 S.C. at 220, 329 S.E.2d at 425. At trial, both parties will have the opportunity to develop evidence on the issue of whether or not the official zoning map in Richland County is the exclusive means for acquiring zoning information.

2. Justifiable Reliance

Buyer contends there is a question of material fact whether its reliance on the representations of County officers and staff, acting within their proper scope of authority, was justified. We agree.

At the zoning hearing, Price was asked about Staff's determination that Buyer's parcel was zoned RU, and the Planning Commission's subsequent approval of Buyer's subdivision plan for manufactured housing which was predicated upon RU zoning. Price admitted: "It was thought to be approvable when we were asked." Price also conceded subdivision coordinator Gosline told him the parcel was zoned RU. Price then reviewed tax cards from the assessor's office showing the parcel's zoning as RU; however, Price could offer no reason for the contradictions of these statements and his later determination the development had a classification of RS-1.

Broker testified he met with subdivision coordinator Gosline about two months before Buyer purchased the parcel. Broker stated it was the common practice for brokers to consult Staff to determine a parcel's zoning classification. He also acknowledged that, prior to November 17, 2004, he was unaware County kept an official zoning map and had never heard of developers demanding to see it. Additionally, Broker testified that Gosline determined the parcel was zoned RU by looking it up on his computer. Broker confirmed he later saw a tax bill that showed the property was zoned RU. Finally, Broker stated prior to November 17, 2004, all County documents referring to the parcel, including Buyer's recorded subdivision plat, showed the parcel was zoned RU.

Based on all of these assertions, Buyer purchased the parcel, then surveyed, platted and prepared it for development. We hold this evidence created a genuine issue of material fact as to whether Buyer's reliance on the representations of County officers and staff was justified.

3. Prejudicial Change in Position

Buyer contends there is a question of material fact whether harm was caused by his justifiable reliance on the County's representations. Specifically, he argues there was evidence that: (1) after County's Planning Staff determined the parcel was zoned RU, which permitted a manufactured home subdivision, Buyer purchased the parcel and prepared it for development; (2) after the Planning Commission unanimously approved the subdivision plan for Brockington Acres, Buyer recorded the plat, marketed the property, and sold lots for twelve months without objection; and (3) after County granted permits to purchasers for installation of their manufactured homes, it notified Buyer the parcel was zoned RS-1 and development must cease.[3]

Buyer contends that, as a result of his detrimental reliance, the value of his property was greatly diminished. Broker testified mobile homes predominate in the community encompassing Brockington Acres and lots for "stick-built homes" do not sell as quickly as lots for manufactured-homes. After County told Buyer he could not install manufactured-homes on his property, he sold six lots at a twenty-percent discount to the church members who had earlier opposed his development, losing a substantial amount of interest Buyer would have received from self-financing those six lots to the original purchasers. We believe these facts clearly demonstrate a question of Buyer's prejudicial change in position.

Under the standard of review for summary judgment, we find questions of material fact exist on each of the elements of Buyer's cause of action for equitable estoppel. Accordingly, the court's order granting County summary judgment on this cause of action is reversed.

---

[3] Purchasers who had received permits and had placed mobile homes on their lots were required to remove them.

CONCLUSION

The circuit court's grant of summary judgment in favor of County on Buyer's claims of the existence of a valid zoning ordinance and inverse condemnation are affirmed. The grant of summary judgment in favor of County on Buyer's claims of negligence, negligent misrepresentation, and equitable estoppel are reversed.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

CURETON, A.J., concurs. PIEPER, J., dissents in a separate opinion.

PIEPER, J., dissenting:

While I recognize the facts of the case are troubling, I respectfully dissent.

I do not believe that the Tort Claims Act provides a remedy for any negligence or mistake of a governmental employee not authorized by statute or ordinance to deviate from a zoning ordinance duly passed by the county. The negligence or mistake at issue did not involve the exercise of a discretionary act by even the duly authorized zoning administrator; instead, the negligent act or mistake at issue was the misinterpretation of the official zoning classification by an official other than the zoning administrator. Moreover, there simply is no indication that the zoning administrator or anyone else had the authority to deviate from the official zoning classification absent a duly authorized variance.

I am also concerned that the opinion may be interpreted as modifying the long-standing jurisprudence of this state regarding the application of estoppel against a governmental entity by recharacterizing a possible estoppel claim, if any, into one for negligence or negligent misrepresentation. United States Supreme Court Justice Oliver Wendell Holmes once noted that "men must turn square corners when they deal with the Government." Rock Island,

A. & L. R. Co. v. United States, 254 U.S. 141, 143 (1920). This case indeed presents such a situation and the majority opinion is very compelling as to the estoppel issue and the issue of summary judgment.

However, based upon my interpretation of the law on this issue, I would affirm the decision of the circuit court.